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## ARBITRATION AGREEMENT AND NON-SIGNATORIES. A COMPARATIVE PERSPECTIVE AND POLISH SOLUTIONS

### 1. INTRODUCTION

The article discusses an issue of extension of arbitration agreements to non-signatories, which involves spanning their scope over entities that have never signed them<sup>1</sup>. The problem has been frequently analysed by foreign practice and arbitral tribunals. However, in Poland that tenet seems to be fairly unexplored and there is still a need for a wide discussion on the topic and potential directions of its evolution. Apart from a series of articles and chapters of monographs, there is a paucity of more complex and coherent analysis of the phenomenon, although it is an extremely interesting problem. An answer to the question of who is really bound by an arbitration agreement or could be bound in the future, except for the actual parties to the agreement, is crucial. Nevertheless, the forthcoming analysis must be preceded by a couple of overall remarks.

According to the prevailing opinion among scholars, arbitration itself relies upon parties' consent<sup>2</sup>. The purpose of an arbitration agreement is to refer a dispute that could arise between parties to an impartial institution or a person chosen by

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<sup>1</sup> W.W. Park: *Arbitration of International Business Disputes. Studies in Law and Practice*, 2<sup>nd</sup> ed., Oxford 2012, p. 297; J.M. Hosking: *Non-Signatories and International Arbitration in the United States: the Quest for Consent*, *Arbitration International* 2004, Vol. 20, No. 3, p. 289.

<sup>2</sup> G.B. Born: *International Commercial Arbitration*, Vol. 1, 2<sup>nd</sup> ed., Kluwer Law International 2014, pp. 1408–1409; M.L. Moses: *The Principles and Practice of International Commercial Arbitration*, Cambridge University Press 2012, p. 35; W.W. Park: *Arbitration...*, *op. cit.*, p. 297.

them at the same time excluding a trial before a common (state) court. The arbitration agreement can be drawn up as an agreement concluded after the dispute has arisen (in Poland it is mandatory in the case of employment or consumer disputes) or before the prospective dispute. Under Article 1161 § 1 of the Polish Code of Civil Procedure (hereinafter referred to as PCCP)<sup>3</sup>, in an arbitration agreement the parties must indicate the subject of a dispute or at least a legal relationship from which the dispute may arise or has arisen. Thus, arbitration agreement always refers to some other contractual relationship. Hence, it can be shaped as an arbitration clause — an additional stipulation in the main contract concluded between parties, or it can also be an additional, separate agreement which refers to the main contract. Such a distinction is rather important regarding the topic of this publication because the extension of arbitration agreement to non-signatories concerns rather arbitration clauses. For the purpose of this article, the author shall use the following notions: “arbitration clause”, “arbitration agreement”, “main contract”, “underlying contract” or “container contract”<sup>4</sup>. The term of arbitration clause shall refer to an additional, contractual provision in a container contract. The term of arbitration agreement shall be used if the author does not want to make a particular distinction between arbitration clauses and separate arbitration agreements. Additionally, the notions of container contract, underlying contract or main contract shall be used interchangeably to describe contracts which the arbitration agreement is referring to. The concept of the extension of arbitration agreement to non-signatories firstly has been worked out by a practice of international commercial arbitration. The aim of the concept is to extend the scope of the binding effect of arbitration agreements to persons who have not signed them<sup>5</sup>. The justification of that scheme is rooted in a relationship of such persons to one of the contractual parties or a relationship to the main contract itself (i.e. by performing its part). Consequently, such a third party, regardless of whether as a claimant or as a defendant, might be also a party to further arbitration proceedings<sup>6</sup>.

The application of that scheme differs in various jurisdictions. Furthermore, some of the grounds for extending the scope of an arbitration agreement have been questioned by some jurisdictions<sup>7</sup>. Until now, courts from common law jurisdictions

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<sup>3</sup> Act of 17 November 1964 — Code of Civil Procedure (Journal of Laws of 1964, No. 46, item 296).

<sup>4</sup> The notion: “container contract” is widely accepted by American scholars; cf.: J. Carter, J. Fellas (eds.): *International Commercial Arbitration in New York*, New York 2010, p. 139; E. Brunet, R.E. Speidel, J. Sternlight, S.J. Ware (eds.): *Arbitration Law in America, A Critical Assessment*, New York 2006, pp. 96–97; J. Graves, Y. Davydov: *Competence-Competence and Separability — American Style* [in:] S. Kröll, L.A. Mistelis, P. Perales Viscasillas, V. Rogers (eds.), *International Arbitration and International Commercial Law. Synergy, Convergence and Evolution*, Kluwer Law International 2011, p. 176. Therefore, it shall also be used hereinafter.

<sup>5</sup> M.L. Moses: *The Principles...*, *op. cit.*, pp. 34–35.

<sup>6</sup> T. Várady, J.J. Barceló III, A.T. von Mehren: *International Commercial Arbitration. A Transnational Perspective*, 5<sup>th</sup> ed., West 2012, p. 212.

<sup>7</sup> O. Sandrock: *Arbitration Agreements and Groups of Companies*, *The International Lawyer* 1993, Vol. 27, No. 4, pp. 941–942.

have developed the following bases: implied consent, agency, third-party beneficiary, equitable estoppel, veil piercing doctrine. Some of jurisdictions (e.g. Switzerland), instead of veil piercing doctrine, deeply rooted in the common law culture, apply some equivalent bases such as an abuse of rights. It has been pointed out that also an incorporation by reference is a basis for extending a personal scope of the arbitration agreement to non-signatories. In that case, a third party can be bound by the arbitration agreement though the contract which has been signed does not contain an arbitration clause. Instead of that, its content refers to another document in which the arbitration agreement has been placed (i.e. when the contract refers to a standard form contract)<sup>8</sup>. In common law as well as in civil law countries it has been widely acknowledged that an arbitration agreement can be transferred through a legal succession (i.e. through a merger of companies), an assignment, subrogation or an assumption of a debt. Apart from the aforementioned ones, arbitral tribunals have developed also a group of companies doctrine<sup>9</sup>. Commentators point out that the last one has been specifically worked out in the international arbitration context.

Theorists propose to divide the aforesaid bases into two categories. The first category should encompass the following: implied consent, agency, equitable estoppel, third-party beneficiary, incorporation by reference. Such bases would be governed by the principles of contract law. First and foremost, it must be said that these rules concern mainly the contract law principles existing in common law countries, therefore, some of the aforementioned legal institutions do not have to fit in with Polish statutory solutions, especially law of obligations. Additionally, it is worth mentioning that, as the prevailing opinion in foreign jurisprudence specifies, the arbitration agreement should be deemed a contractual construct<sup>10</sup>. Apart from the aforementioned grounds, the doctrine also invokes a legal succession, an assignment, an assumption of debt<sup>11</sup>, which are also typical, contractual institutions. The second category would encompass veil piercing doctrine as a construct typical of corporate law (*lex societatis*)<sup>12</sup>. Furthermore, as it shall be explained hereinafter, the group of companies should fall within the scope of the first group as a contractual basis. Although its name could suggest that it has strong implications towards corporate law, as B. Hanotiau notices, the whole doctrine is “a shortcut to avoid legal reasoning”. However, its main purpose is to determine real parties to the contract through inten-

<sup>8</sup> M.L. Moses: *The Principles...*, *op. cit.*, p. 35; J.M. Hosking: *Non-Signatories...*, *op. cit.*, p. 290; Ł. Błaszczak, M. Ludwik: *Sądownictwo Polubowne (Arbitraż) [Arbitration]*, Warsaw 2007, pp. 115–116.

<sup>9</sup> M.L. Moses: *The Principles...*, *op. cit.*, pp. 35–36; N. Blackaby, J.M. Hunter, C. Partasides, A. Redfern: *Redfern and Hunter on International Commercial Arbitration*, Oxford University Press 2015, pp. 85–91; *Zurich Am. Ins. Co. v. Watts Industries Inc.*, 417 F.3d 687 (7<sup>th</sup> Cir. 2005) (USA).

<sup>10</sup> L.L. Fuller: *Collective Bargaining and the Arbitrator* [in:] M.L. Kahn (ed.), *Collective Bargaining and the Arbitrator's Role*, Proceedings of the 15<sup>th</sup> Annual Meeting, National Academy of Arbitrators 29, Washington D.C. 1962, p. 14.

<sup>11</sup> J.M. Hosking: *Non-Signatories...*, *op. cit.*, p. 290.

<sup>12</sup> W.W. Park: *Arbitration...*, *op. cit.*, pp. 298–299.

tions inferred from the parties' conduct, what makes it a consent-based theory<sup>13</sup>. Resultantly, as it is premised on a concept stemming from its consensual nature, it has been rated among contractual bases having their origins in contract law. B. Hanotiau criticizes an idea of treating the group of companies doctrine as a separate theory<sup>14</sup>. Beside the aforesaid categories of the grounds stemming from corporate or contract law, other scholars propose a different methodology of categorization. G.B. Born makes a distinction regarding consensual and nonconsensual character of such bases. As he notices, the first category includes purely consensual theories (i.e. agency, assignment) and the second category contains nonconsensual theories (i.e. estoppel, veil piercing) focusing more on equity and fairness<sup>15</sup>.

Moreover, some scholars point to corporate disputes involving officers or directors as possibly constituting grounds for the extension of the arbitration clause<sup>16</sup>. Such a problem mainly concerns arbitration clauses placed in articles of association or corporate by-laws. This poses a question of whether such an arbitration clause can bind corporate officers or directors in the event of corporate disputes among shareholders or between shareholders and the company, although the officers have not signed it, just because they hold down managerial positions in the company. Furthermore, because this article has a limited scope, it shall not discuss the matter of investment arbitration, between a hosting state and a foreign investor under Bilateral Investment Treaties (BITs). It will not concern a problem of class actions and class arbitrations, either.

Often, the extension of an arbitration agreement to non-signatories from the perspective of international commercial arbitration has been justified with regard to a sense of justice or good morals. For instance, when labour rights, human rights or environmental issues are at stake<sup>17</sup>. Especially, there is a prevailing opinion that in the realm of international trade, huge corporations operate through their subsidiaries, over which they mostly have absolute control<sup>18</sup>. The situation, e.g. where only a subsidiary that entered into the main contract with arbitration clause is brought before an arbitration panel, while a parent company performing overwhelming control over that subsidiary at the time of conclusion of such a contract avoids the arbitration, raises serious questions of the effectiveness of the whole system. On the other hand, in international commercial arbitration, the consent to arbitration is

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<sup>13</sup> B. Hanotiau: *Consent to Arbitration: Do we Share a Common Vision?*, *Arbitration International* 2011, No. 4, p. 546.

<sup>14</sup> *Ibidem*.

<sup>15</sup> G.B. Born: *International...*, *op. cit.*, p. 1418.

<sup>16</sup> *Ibidem*, pp. 1477–1480.

<sup>17</sup> Y. Kryvoi: *Piercing the Corporate Veil in International Arbitration*, *Global Business Law Review* 2011, Vol. 1, No. 169, pp. 173–174.

<sup>18</sup> R. Daujotas: *Non-Signatories and Abuse of Corporate Structure in International Commercial Arbitration*, *International Economic Law eJournal* 2012, Vol. 7, No. 78, pp. 2–3; J. Ruggie: *Protect, Respect and Remedy: A Framework for Business and Human Rights*, *Innovations*, Spring 2008, p. 191; H. Holtzman, J. Neuhaus: *A Guide to the UNCITRAL Model Law on International Commercial Arbitration*, Kluwer 1994, p. 300.

fundamental<sup>19</sup> and forcing third parties to arbitrate, where their will to arbitrate is not that obvious, might challenge an axiological mainstay which lies beneath such a method of dispute resolution<sup>20</sup>. Commentators and some arbitration tribunals identify at least some of the aforesaid bases for the extension of arbitration agreements with international trade usage and peculiar *lex mercatoria*. That is also a serious pattern in a wide debate over a transnational nature of international arbitration and its legal sources in the context of *lex mercatoria*<sup>21</sup>.

Nevertheless, there is a wide discussion pending over the role of consent in international commercial arbitration (B. Hanotiau<sup>22</sup>, A. Steingruber<sup>23</sup>, S. Brekoulakis<sup>24</sup>). Some scholars suggest that a role of consent as a fundamental prerequisite in international commercial arbitration has been recently decreased. Some also propose alternative solutions, e.g. through replacing a requirement of consent with an overall assessment of case facts and real impact which a potential arbitral award might have on third persons' interests involved in the dispute (the non-signatories' interests). This would mean that the subjective features (parties' intentions) could be diminished for the benefit of the objective ones (i.e. parties' involvement in a dispute, economic reality, procedural effectiveness, etc.). A. Steingruber indicates that a term "consent" has a lot of meanings such as: a consensual act, a permission, or an agreement. Therefore, although the arbitration is premised on parties' consent, it does not mean that the parties must enter into an arbitration agreement (arbitration clause).

Furthermore, the tenet should also be analysed with respect to a problem of the form of an arbitration agreement. In many jurisdictions, it is mandatory to draw up an arbitration agreement in writing, otherwise it is null or ineffective<sup>25</sup>. Meanwhile, the extension of the scope of an arbitration agreement to entities that have not signed the contract might violate such a requirement<sup>26</sup>. Contrarily, some other jurisdictions seem to loosen up the requirements regarding the form of an arbitration agreement<sup>27</sup>. Nevertheless, it must be said that the written form does not have to mean an agreement signed by both parties. In Poland, the written form is practically tantamount

<sup>19</sup> G.B. Born: *International...*, *op. cit.*, pp. 1408–1409.

<sup>20</sup> S. Sołtysiński: *Związanie zapisem na sąd polubowny i orzeczeniem arbitrażowym członków zgrupowania spółek, ich wspólników i interesariuszy* [Binding effect of an arbitration agreement and arbitral awards for members of a group of companies, their shareholders and stakeholders], *Problemy Prawa Prywatnego Międzynarodowego* 2012, No. 11, p. 13.

<sup>21</sup> G.B. Born: *International...*, *op. cit.*, p. 1493.

<sup>22</sup> B. Hanotiau: *Consent...*, *op. cit.*

<sup>23</sup> A.M. Steingruber: *Consent in International Arbitration*, Oxford 2012.

<sup>24</sup> S. Brekoulakis: *Rethinking Consent in International Commercial Arbitration: A General Theory for Non-Signatories*, *Journal of International Dispute Settlement* 2017, No. 8; S. Brekoulakis: *Third Parties in International Commercial Arbitration*, New York 2010.

<sup>25</sup> E. Gaillard, G.A. Bermann: *The UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards New York 1958*, Brill Nijhoff 2017, p. 60.

<sup>26</sup> G.B. Born: *International...*, *op. cit.*, pp. 1489–1491.

<sup>27</sup> W.W. Park: *Arbitration...*, *op. cit.*, pp. 300–301; S. Sołtysiński, *Związanie...*, *op. cit.*, p. 10.



to a document signed by both parties, while in other jurisdictions the written form does not necessarily require parties' signatures (e.g. in Australia)<sup>28</sup>.

In Poland, the concept that is the topic hereof seems to be still an unexplored tenet<sup>29</sup>. However, before analysing a possibility of applying the idea to Polish law, some basic assumptions must be introduced. First, it has to be decided whether an arbitration agreement under Polish law is a substantive law (contract law) construct<sup>30</sup>, or a procedural institution<sup>31</sup>. Legal provisions regulating the arbitration agreement are set forth among the rules of civil procedure (Article 1161 et seq. PCCP). Also, the consequences of a conclusion of an arbitration agreement affect merely a procedural dimension. Each party can contest a common (state) court's jurisdiction on the basis of an arbitration agreement. Such an objection practically prevents a state court from trying a case. Opposite to that, other commentators hold that an arbitration agreement is rather a substantive law matter, and therefore it is of a contractual nature<sup>32</sup>. Most of all, the arbitration agreement is often concluded outside the trial<sup>33</sup>. Furthermore, the arbitration agreement cannot be withdrawn by one of the parties without mutual consent of both, whilst the procedural acts can be generally withdrawn by parties<sup>34</sup>. Deciding that crucial issue is of great importance to this article. Depending on whether the arbitration agreement is a substantive law or a procedural law institution, different provisions shall be applied to assess it. In the case if it is a substantive law institution, supplementarily the provisions of the Polish Civil Code<sup>35</sup> (hereinafter referred to as PCC) shall be applied, including those referring to contracts. However, if it is a procedural law construct, the PCCP provisions shall be applied accordingly, i.e. those regulating a joinder or an intervention in proceedings or procedural subrogation during a litigation. Additionally, regarding the fact that the aforesaid theories cannot be defended without any doubts, sometimes particular views are raised that the arbitration agreement has a mixed nature, both contractual and

<sup>28</sup> C. Utz [in:] J.W. Rowley (ed.), *Arbitration World*, 2<sup>nd</sup> ed., London 2006, p. 5.

<sup>29</sup> M. Tomaszewski [in:] A. Szumański (ed.), *Arbitraż handlowy. System Prawa Handlowego [Commercial arbitration. Commercial Law System]*, Vol. 18, Warsaw 2015, pp. 374–375.

<sup>30</sup> A. Budniak-Rogala: *Charakter prawny zapisu na sąd polubowny w postępowaniu cywilnym [Legal nature of an arbitration agreement in civil proceedings]*, Wrocław 2015, p. 498; M. Hałas: *Charakter prawny zapisu na sąd polubowny [Legal nature of an arbitration agreement]*, Przegląd Ustawodawstwa Gospodarczego 2007, No. 7, p. 8.

<sup>31</sup> R. Kulski: *Umowy procesowe w postępowaniu cywilnym [Procedural agreements in civil proceedings]*, Zakamycze 2006, p. 167; M. Tomaszewski [in:] A. Szumański (ed.), *Arbitraż...*, op. cit., pp. 338–339; M. Tomaszewski: *Umowa o arbitraż. Podstawowe problemy prawne [Arbitration agreement. Basic legal issues]*, Przegląd Ustawodawstwa Gospodarczego 1994, No. 1, pp. 15–16; T. Ereciński, K. Weitz: *Sąd arbitrażowy [Arbitration]*, Warsaw 2008, pp. 85–86.

<sup>32</sup> K. Siedlik: *Charakter prawny umowy arbitrażowej w prawie niemieckim i polskim [Legal nature of an arbitration agreement in German and Polish law]*, Przegląd Ustawodawstwa Gospodarczego 2000, No. 2, pp. 20–26; Ł. Błaszczak: *Wyrok sądu polubownego w postępowaniu cywilnym [Arbitral award in civil proceedings]*, Warsaw 2010, p. 114; M. Mazur: *Moc wiążąca umów procesowych na przykładzie zapisu na sąd polubowny [Effectiveness of procedural agreements on the example of arbitration agreement]*, ADR. Arbitraż i Mediacja 2011, No. 1, p. 51.

<sup>33</sup> T. Ereciński, K. Weitz: *Sąd...*, op. cit., p. 81.

<sup>34</sup> *Ibidem*, p. 82.

<sup>35</sup> Act of 23 April 1964 — Civil Code (Journal of Laws of 1964 No. 16, item 93).

procedural<sup>36</sup>, or should be treated at least as a *sui generis* agreement<sup>37</sup>; and although it does not have an enforceable consideration<sup>38</sup>, the lack of which could cause damage to one of the parties<sup>39</sup>, it still should be evaluated accordingly through a perspective of substantive law provisions (particularly PCC). Scholars, regardless of the aforementioned remarks, are commonly keen on accepting the fact that PCC provisions can be applied supplementarily to the assessment of the arbitration agreement, e.g. in the case of defects in a declaration of will<sup>40</sup>. Thus, for the purpose of the subsequent study, the author shall adopt such an assumption. Therefore, when comparing the grounds for the extension of the arbitration agreement to non-signatories at the international level with those existing under Polish law, the author shall resort firstly to PCCP and then to the PCC provisions, i.e. the provisions of the substantive law.

In addition, the author would like to point at potential threats that could arise by adopting the discussed theories without any reservations in Polish law. First, it is worth considering whether such an extension of the arbitration agreement to a third person would not violate their constitutional right to court (Article 45 of the Polish Constitution). Moreover, there is a question of whether an unjustified extension of the arbitration agreement scope would not induce a serious flaw of an arbitral award issued on the basis of such an agreement<sup>41</sup> or whether as a matter of public policy (i.e. protection of the third party's right to court) such an award, when foreign, would be still enforceable in Poland. Such deliberations shall also be covered by this publication. In the end, the author shall sum up his analysis and try to draw some conclusions.

## 2. EXTENSION OF THE ARBITRATION AGREEMENT TO NON-SIGNATORIES: A COMPARATIVE ANALYSIS

At the beginning, the possibility of extending the arbitration agreement to non-signatories appeared in arbitral awards issued in international commercial disputes. First, the spotlight must be turned on the arbitral award in case *Dow Chemical*<sup>42</sup>,

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<sup>36</sup> R. Kuratowski: *Sądownictwo polubowne [Arbitration]*, Warsaw 1932, p. 24; S. Dalka: *Sądownictwo polubowne w PRL [Arbitration in the Polish People's Republic]*, Warsaw 1987, pp. 56–57; W. Siedlecki: *Postępowanie cywilne. Zarys wykładu [Civil proceedings. An outline]*, Warsaw 1987, pp. 479–480.

<sup>37</sup> M. Pazdan: *Prawo właściwe dla oceny zapisu na sąd polubowny [Governing law for evaluation of an arbitration agreement]*, Rejent 2003, No. 10, p. 176.

<sup>38</sup> A. Wiśniewski: *Międzynarodowy arbitraż handlowy w Polsce [International commercial arbitration in Poland]*, Warsaw 2011, pp. 314–315.

<sup>39</sup> R. Kulski: *Umowy procesowe...*, *op. cit.*, p. 174.

<sup>40</sup> Ł. Błaszczak, M. Ludwik: *Sądownictwo...*, *op. cit.*, pp. 86–87; T. Ereciński, K. Weitz: *Sąd...*, *op. cit.*, p. 81; R. Kulski: *Umowy procesowe...*, *op. cit.*, p. 156; W. Siedlecki: *Postępowanie...*, *op. cit.*, p. 480; M. Tomaszewski [in:] A. Szumański (ed.), *Arbitraż...*, *op. cit.*, p. 339.

<sup>41</sup> Ł. Błaszczak, M. Ludwik: *Sądownictwo...*, *op. cit.*, p. 278.

<sup>42</sup> *Dow Chemical France et al. v. ISOVER Saint Gobain (France)*, ICC Award No. 4131/1982 (interim award), 9 YCA (1984) 131.

rendered by the International Chamber of Commerce (ICC) panel. The award issued in that case has been widely cited by the majority of practitioners dealing with international commercial arbitration as an example of extension of arbitration agreement on the basis of a group of companies doctrine<sup>43</sup>. The arbitration panel emphasized that the doctrine is a part of international trade usage, peculiar *lex mercatoria*. However, the award also reached some other conclusions that should be pointed out. First and foremost, the group of companies doctrine was not a sole basis to span the scope of the arbitration agreement. It was tied up with other factors, such as a participation of third parties belonging to the same group of companies in the conclusion and performance of the main contract. Furthermore, the non-signatories as group members wanted to extend the arbitration agreement's scope to themselves and consequently participate in the arbitration proceedings, which, under normal circumstances, they would not have attended<sup>44</sup>.

G.B. Born specifies that in the case of extending the arbitration agreement's scope, the purpose is to determine real parties' intent, what means both: intent of formal parties to the main contract and of a non-signatory to it<sup>45</sup>. W.W. Park uses a term: "less than obvious party" to describe non-signatories<sup>46</sup>. Grounds such as an agency or a group of companies doctrine aim to determine whether the non-signatory was willing to be a party to the contract by their participation in its performance, and whether the actual parties to the contract thought that the non-signatory was a quasi-party to it. The will to be bound by arbitration clause does not have to necessarily appear at a stage of a contract conclusion. It can come up at a subsequent level, i.e. through the performance or termination of the contract. However, simple participation in performance of some exact and limited part of the contract without additional factors would not extend the arbitration agreement<sup>47</sup>.

As it has been stated previously, international commercial practice following common law jurisprudence has developed the following grounds, sometimes differently identified (named), that could be the basis for extension of arbitration agreements to non-signatories: an agency, a third-party beneficiary, an equitable estoppel, an implied consent, a veil piercing, an incorporation by reference, a legal succession, an assignment, subrogation, an assumption (acquisition) of a debt<sup>48</sup>, as well as the most controversial: the group of companies doctrine. Some admit that also a joint and several liability (i.e. a surety or a guarantee) might extend an arbitration clause

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<sup>43</sup> G.B. Born: *International...*, *op. cit.*, pp. 1493–1494.

<sup>44</sup> T. Várady, J.J. Barceló III, A.T. von Mehren: *International...*, *op. cit.*, p. 221.

<sup>45</sup> G.B. Born: *International...*, *op. cit.*, p. 1415.

<sup>46</sup> W.W. Park: *Arbitration...*, *op. cit.*, p. 298.

<sup>47</sup> G.B. Born: *International...*, *op. cit.*, p. 1428; T. Várady, J.J. Barceló III, A.T. von Mehren: *International...*, *op. cit.*, p. 221.

<sup>48</sup> M.L. Moses: *The Principles...*, *op. cit.*, pp. 34–35; T. Várady, J.J. Barceló III, A.T. von Mehren: *International...*, *op. cit.*, p. 219; *The Rice Company (Suisse), S.A. v. Precious Flowers Ltd.*, 523 F.3d 528, 536 (5<sup>th</sup> Cir. 2008) (USA); *Bridas S.A.P.I.C. v. Government of Turkmenistan*, 345 F.3d 347, 358 (5<sup>th</sup> Cir. 2003) (USA).



to non-signatories, however, the prevailing majority of scholars is rather sceptical about such an idea pointing out that a surety's liability is independent of a main debt, therefore as an obligation *vis-à-vis* the main one it cannot be a basis for establishing an arbitral panel's jurisdiction over the non-signatory. The problem shall be discussed hereinafter. The purpose of the dissertation is not to describe the aforesaid grounds in detail, because it has been (and still is) a domain of international arbitration practitioners. However, for the purpose of this publication it is necessary to describe them roughly, and then compare them with current solutions worked out under Polish law.

Agency rests upon a theory that a person who has concluded a main contract and an arbitration agreement acts as an agent of another person, who is supposed to be a principal in this case<sup>49</sup>. Nevertheless, the circumstances of each case must indicate that the agent operates within a scope of their authorization. Some jurisdictions (e.g. in the USA) point to the concept of *apparent authority*, where the principal's conduct can mislead a third person to a false impression that agent operates not only on their own behalf but also on behalf of the principal<sup>50</sup>. A fairly similar solution is known in French law as *mandat apparent*<sup>51</sup>.

Nonetheless, the assessment of the situation and its circumstances, and making a decision on whether the principal can be really bound by an arbitration agreement on the basis of apparent authority requires to balance between some interests<sup>52</sup>. In the context of binding effect of the arbitration agreement on third parties, the agency doctrine is often invoked as a substitute of veil piercing and justification of extension of an arbitration agreement to companies operating in one holding group (a group of companies). On the one hand, the concept of apparent authority is supported by the need for certainty in professional bargain between entrepreneurs, where a third party's expectations rely on a false impression that they deal not only with the agent but also with the principal<sup>53</sup>. On the other hand, the concept can be overused and therefore let to span the scope of an arbitration agreement to entities that could at least expect to be a party to arbitration proceedings.

The next ground for the extension of an arbitration clause to non-signatories is an *equitable estoppel*, a well-recognized legal doctrine, which can be invoked to preclude parties from denying that they are party to arbitration (or other) agreements<sup>54</sup>. In civil law countries similar conceptions operate under the notions of good faith, abuse of right, or *venire contra factum proprium*<sup>55</sup>. Generally, the doctrine means

<sup>49</sup> G.B. Born: *International...*, *op. cit.*, p. 1419; J.M. Hosking: *Non-Signatories...*, *op. cit.*, p. 292.

<sup>50</sup> Restatement (Third) of Agency § 2.03 (2006); R.W. Hamilton, J.R. Macey, D.K. Moll: *Cases and Materials on Corporations Including Partnerships and Limited Liability Companies*, 11<sup>th</sup> ed., West 2010, p. 24.

<sup>51</sup> G.B. Born: *International...*, *op. cit.*, p. 1424; M.L. Moses: *The Principles...*, *op. cit.*, p. 36.

<sup>52</sup> M.L. Moses: *The Principles...*, *op. cit.*, p. 36; O. Sandrock: *Arbitration...*, *op. cit.*, p. 942; W.W. Park: *Arbitration...*, *op. cit.*, p. 298.

<sup>53</sup> G.B. Born: *International...*, *op. cit.*, p. 1426.

<sup>54</sup> *Ibidem*, p. 1472; M.L. Moses: *The Principles...*, *op. cit.*, p. 37.

<sup>55</sup> G.B. Born: *International...*, *op. cit.*, p. 1473; S. Sołtysiński: *Związanie...*, *op. cit.*, p. 27.

that a party is barred from acting inconsistently with their own previous statements or conduct due to considerations of equity<sup>56</sup>. Commentators divide the circumstances under which the doctrine can be applied in two categories, depending on whether the non-signatory gains direct benefits from the contract. The first category covers the circumstances that indicate interrelations of contracts (*intertwined issues*). As an example, some practitioners point to a chain of contracts (also web-type contracts, string contracts, etc.)<sup>57</sup>. It refers to the situation where one contract containing an arbitration clause is functionally related to another contract which does not have an arbitration clause (i.e. if contracts are entered into within the scope of one construction project, and only the contract between an investor and a general contractor contains an arbitration clause, whilst the contract with a subcontractor does not contain any)<sup>58</sup>. The party to that second contract (who is a non-signatory to the arbitration clause) could demand to join arbitration proceedings by invoking the arbitration clause in the first one. The scholars emphasize, however, that if a party to the arbitration clause wanted to use it against a non-signatory, it would be impossible<sup>59</sup>. Thus, scholars and courts differentiate the legal situation of signatories and non-signatories, depending on who is demanding that the scope of the arbitration agreement be extended. The signatory could not demand the extension of the scope to the non-signatory invoking as a solely basis the interrelations of contracts<sup>60</sup>, nonetheless, this could work in opposite directions. When discussing the problem of intertwined contracts, it must be mentioned that they have to be inextricably intertwined. The second category encompasses situations, where the non-signatory, apart from the interrelation of contracts, gains a direct benefit from the main contract containing an arbitration clause. If so, the difference in a legal position of the signatory and the non-signatory would not matter. They could invoke the arbitration clause in both directions<sup>61</sup>.

The difference between positions of the non-signatory and the signatory when demanding the extension of an arbitration agreement was an issue in case *Thomson-CSF*<sup>62</sup>. The American federal court held that such a difference is justified in the case of intertwined disputes. The scholars point out that the reason for such a difference stems from the fact that the signatory to an arbitration agreement can predict that at some point they shall be a party to arbitration proceedings, regardless of who will be a counterparty. A third person does not have such knowledge and cannot predict

<sup>56</sup> G.B. Born: *International...*, *op. cit.*, pp. 1472–1473.

<sup>57</sup> S. Brekoulakis: *Third Parties...*, *op. cit.*, pp. 84–85.

<sup>58</sup> S. Brekoulakis: *Parties in International Arbitration: Consent vs Commercial Reality* [in:] S. Brekoulakis, J.D.M. Lew et al. (eds.), *The Evolution and Future of International Arbitration*, Kluwer Law International 2016, pp. 131–132.

<sup>59</sup> M.L. Moses: *The Principles...*, *op. cit.*, p. 37.

<sup>60</sup> J.M. Hosking: *Non-Signatories...*, *op. cit.*, p. 291.

<sup>61</sup> M.L. Moses: *The Principles...*, *op. cit.*, p. 37; *American Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 353 (2<sup>nd</sup> Cir. 1999) (USA).

<sup>62</sup> *Thomson-CSF S.A. v. American Bar Association*, 64 F.3d 779 (2<sup>nd</sup> Cir. 1995) (USA).

such consequences because of the interrelation between contracts, and resultantly they are unable to predict that they could be bound by an arbitration agreement contained in a contract which they have not signed. Thus, in this case, the third person should get an advantage over the signatory<sup>63</sup>. Also, it is worth noting that in case *Dow Chemical* the non-signatories were claimants and those demanding the span of the arbitration agreement to themselves. The idea reflects one of the most fundamental principles existing in international commercial arbitration: legitimate expectations of the parties. Foreseeability of a proper interpretation of the contract provisions, pursued by arbitrators, is therefore of great importance<sup>64</sup>.

Some practitioners, however, question the aforesaid standpoint claiming that differentiating the position of the parties depending on who is demanding the extension of an arbitration agreement, whether it is the signatory or the non-signatory, in the case of complicated, cross-border disputes does not have to match a reality of modern international trade<sup>65</sup>. It is a pattern worth consideration. Especially that in the international trade practice there are often many interrelated contracts concluded between parties, where the role of third persons is significant enough that they should be also brought before an arbitration panel<sup>66</sup>. The possibility of having all disputes stemming from interrelated contracts, where just some of them contained the arbitration clause, tried by one arbitral panel would make the system of disputes settlement more effective<sup>67</sup>. On the other hand, binding a third person with an arbitration agreement without their consent could be treated as an abuse of the third person's right to court which is often guaranteed by constitutional provisions (e.g. in Poland).

The aforesaid basis regarding direct benefits from the contract seems to be closely related to the next one: the concept of a third-party beneficiary. As scholars notice, a third party who gains benefits from a main contract should be bound by an arbitration agreement (arbitration clause). Such a theory is supported by a belief that a non-signatory who benefits from the main contract cannot avoid its burdens, i.e. a method of dispute resolution. Given that, if a third party can pursue a claim towards parties to the contract under its provisions, the third party will be bound also by the arbitration clause. Resultantly, the third party is entitled to launch claims stemming from the contract only before the arbitral panel. G.B. Born makes a clear distinction between direct and indirect benefits. Only the first ones would oblige

<sup>63</sup> W.W. Park: *Arbitration...*, *op. cit.*, pp. 309–310.

<sup>64</sup> P. Lalive: *Transnational (or Truly International) Public Policy and International Arbitration* [in:] P. Sanders (ed.), *Comparative Arbitration Practice and Public Policy in Arbitration*, ICCA Congress Series, Vol. 3, Kluwer Law International 1987, pp. 304–305.

<sup>65</sup> G.B. Born: *International...*, *op. cit.*, p. 1416; T. Várady, J.J. Barceló III, A.T. von Mehren: *International...*, *op. cit.*, p. 221.

<sup>66</sup> P.J. Martinez-Fraga: *The Dilemma of Extending International Commercial Arbitration Clauses to Third Parties: Is Protecting Federal Policy While Accommodating Economic Globalization a Bridge to Nowhere?*, *Cornell International Law Journal* 2013, Vol. 46, pp. 315–317.

<sup>67</sup> W.W. Park: *Arbitration...*, *op. cit.*, p. 298.

a non-signatory to refer to arbitration<sup>68</sup>. Generally, direct benefits for a non-signatory will be stipulated in the contract or stem from it, whilst indirect benefits would result e.g. from tort law or will be an effect of a statutory provision<sup>69</sup>. At this point, it is worth drawing attention to the British statutory solutions. Under provisions of the Contracts (Right of Third Parties) Act 1999<sup>70</sup> (Section 8), in case a third party gains direct benefits from a main contract, and all disputes resulting from that contract should be arbitrated, such a third party shall be treated as a party to an arbitration agreement and, consequently, as a party to arbitration proceedings. Therefore, British legislature decided to stick to a third-party beneficiary rule as the basis for extension of the arbitration agreement to non-signatories<sup>71</sup>.

Moreover, some jurisdictions point to the implied consent as a basis for extension of the arbitration agreement to non-signatories. A third party can be bound by the arbitration agreement by their conduct that could indicate their will to be a party to the main contract and thus to the arbitration agreement, e.g. by performing the main contract in its entirety or in part<sup>72</sup>. Nevertheless, also actual parties to that agreement must manifest their implied acceptance of the third party's presence in their contractual relationship<sup>73</sup>. That theory is universal and widely adopted in common law countries, however, its application mostly depends on the facts of each case. The theorists, for example, as a ground for application of that concept point to a third party's participation in arbitration proceedings and participation in arbitrators' nomination, although there has been no arbitration agreement<sup>74</sup>.

The aforesaid theories refer to traditional common law contract principles. These grounds for extending the scope of arbitration agreements are aimed at determining a real content of contractual relationship among parties<sup>75</sup>. One can put forward a thesis that up to some extent such grounds are aimed at preventing contractual inequality between parties, especially when one entity that directly benefits from the contract does not want to bear the encumbrances resulting therefrom. Furthermore, it is widely accepted that the arbitration agreement can be spanned by means of a reference to another document (incorporation by reference)<sup>76</sup>. The arbitration

<sup>68</sup> G.B. Born: *International...*, *op. cit.*, p. 1474; *Thomson-CSF S.A. v. American Bar Association*, 64 F.3d 779 (2<sup>nd</sup> Cir. 1995) (USA).

<sup>69</sup> A. Badia: *Piercing the Veil of State Enterprises in International Arbitration*, Kluwer Law International 2014, p. 99.

<sup>70</sup> Contracts (Rights of Third Parties) Act of 1999, 11<sup>th</sup> November.

<sup>71</sup> J.M. Hosking: *Non-Signatories...*, *op. cit.*, p. 291; A. Tweeddale: *Arbitration under the Contracts (Right of Third Parties) Act 1999 and Enforcement of an Award*, *Arbitration International* 2011, Vol. 27, No. 4, p. 656; N. Andrews: *Strangers to Justice no Longer: The Reversal of the Privity Rule under the Contracts (Rights of Third Parties) Act 1999*, *Cambridge Law Journal* 2001, Vol. 60, No. 2, pp. 362–363.

<sup>72</sup> W.W. Park: *Arbitration...*, *op. cit.*, p. 298.

<sup>73</sup> G.B. Born: *International...*, *op. cit.*, p. 1427; M.L. Moses: *The Principles...*, *op. cit.*, pp. 37–38.

<sup>74</sup> B. Hanotiau: *Complex Arbitrations: Multiparty, Multicontract, Multi-issue and Class Actions*, Kluwer Law International 2006, p. 165; *Gvozdenovic v. United Air Lines, Inc.*, 933 F.2d 1105 (2<sup>nd</sup> Cir. 1991) (USA).

<sup>75</sup> J.M. Hosking: *Non-Signatories...*, *op. cit.*, p. 302.

<sup>76</sup> T. Várady, J.J. Barceló III, A.T. von Mehren: *International...*, *op. cit.*, p. 219.

agreement by reference means that the arbitration clause is contained in a separate and pre-existing document (i.e. standard form contracts) to which the parties' contract refers<sup>77</sup>. Under Article 7(6) of UNCITRAL Model Law of 1985, amended in 2006, the reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract. Most countries which adopted UNCITRAL Model Law require an express and specific reference to the arbitration clause<sup>78</sup>. Nonetheless, in other jurisdictions (e.g. in the USA) more liberal approach has been adopted requiring merely a general reference to the document without explicit reference to the arbitration clause in the other documents<sup>79</sup>.

As commentators point out, the dominant trend in case law holds that an arbitration agreement is not only valid between the parties, but it can also be relied upon against their heirs, their legatees, their assignees and all of those acquiring someone's obligations<sup>80</sup>. For that reason, the arbitration clause will bind an assignee or a person who assumes someone's debt. Many jurisdictions treat the arbitration clause as an ancillary right which follows a right stemming from the main contract. Some even opt for an automatic transfer of an arbitration agreement (e.g. the USA, Switzerland)<sup>81</sup>. Under many national legal systems, there are circumstances where one party may be subrogated to the contractual rights of another party<sup>82</sup>. This frequently occurs in the case of insurers, who are subrogated to the rights of the insured<sup>83</sup>. Generally, the insurer is entitled to invoke (and bound by) the arbitration clause of the insured's main contract<sup>84</sup>.

The theories developed on the basis of contract law principles should be compared with those relating to widely-understood corporate law and liability of shareholders and officers for company's obligations. The author is pointing to the doctrine of piercing the corporate veil. The veil piercing doctrine as grounds for extending an arbitration clause as well as the group of companies doctrine have been deemed controversial by most of scholars<sup>85</sup>. Not all of jurisdictions recognize them as the basis for extending the scope of arbitration agreements. The practitioners usually use the following notions interchangeably: *piercing of the corporate veil*, *lifting of the corporate veil*, *disregard of legal personality*, etc. In Germany, for instance, it is known as *Durchgriffshaftung*. The veil piercing doctrine is mostly associated with

<sup>77</sup> A.M. Steingruber: *Consent...*, *op. cit.*, p. 134.

<sup>78</sup> Section 6(2) of the English Arbitration Act; section 1031(4) of the German Code of Civil Procedure.

<sup>79</sup> A.M. Steingruber: *Consent...*, *op. cit.*, pp. 137–138.

<sup>80</sup> G.B. Born: *International...*, *op. cit.*, p. 1465; J.M. Hunter, C. Partasides, A. Redfern: *Redfern...*, *op. cit.*, p. 89.

<sup>81</sup> G.B. Born: *International...*, *op. cit.*, p. 1467; J.M. Hunter, C. Partasides, A. Redfern: *Redfern...*, *op. cit.*, p. 89; A.M. Steingruber: *Consent...*, *op. cit.*, p. 147.

<sup>82</sup> A.M. Steingruber: *Consent...*, *op. cit.*, p. 150.

<sup>83</sup> G.B. Born: *International...*, *op. cit.*, pp. 1471–1472.

<sup>84</sup> *Ibidem*.

<sup>85</sup> *Ibidem*, p. 1445.



the American legal system, while veil lifting with the British one<sup>86</sup>. Originally, it is a legal institution having its roots in common law which under some specific circumstances enables the scope of liability for a company's debt to be extended to shareholders and officers<sup>87</sup>. What is important, a simple relation of domination between a company and a shareholder or the fact that they operate as a single economic unit are not sufficient to apply the rule. It is necessary to prove an additional factor that would reflect an element of unfairness or at least some abnormalities<sup>88</sup>. The common law judiciary have developed the following factors as examples: an undercapitalization, a lack of formalities, an overlapping composition of boards of directors or management boards, a commingling of financial sources or properties, a siphoning of funds, payments to shareholders without any legal basis<sup>89</sup>. The given list does not exhaust all situations that could bring a liability to shareholders and officers for a company's debts. In the USA such a test can vary between particular states. However, even if the aforementioned bases are met, the court must determine whether there is a fraud or any other unfairness that could harm a third person, e.g. a creditor, otherwise the court would not pierce the corporate veil<sup>90</sup>. Veil piercing has existed in the USA since the 1920s and has been one of the most important patterns in business organizations law<sup>91</sup>. Nonetheless, some scholars criticize the way of its application by courts. The doctrine has been used rather instinctively<sup>92</sup>. Moreover, commentators describe it every time in a different way using epithets and metaphors, such as the doctrine preventing fraud, unfairness, injustice, etc. It has nothing to do with legal certainty<sup>93</sup>. In the UK, the courts are not that keen on lifting the corporate veil, unless there is a plain proof that in the case fraud or other injustice has been involved, the party seeks to avoid its obligations that have already existed, what could cause damage to a third party<sup>94</sup>.

<sup>86</sup> N. Grier: *UK Company Law*, Chichester–New York 1998, p. 27.

<sup>87</sup> W.W. Park: *Arbitration...*, *op. cit.*, p. 306.

<sup>88</sup> G.B. Born: *International...*, *op. cit.*, p. 1439.

<sup>89</sup> *DeWitt Truck Brokers v. W. Ray Flemming* [1976], 540 F.2d at 681 (USA); *Baatz v. Arrow Bar*, Supreme Court of South Dakota, 1990, 452 N.W.2d 138 (USA); T. Várady, J.J. Barceló III, A.T. von Mehren: *International...*, *op. cit.*, p. 220.

<sup>90</sup> G.B. Born: *International...*, *op. cit.*, p. 1436; T. Várady, J.J. Barceló III, A.T. von Mehren: *International...*, *op. cit.*, p. 219.

<sup>91</sup> M. Wormser: *Piercing the Veil of Corporate Entity*, Col.L.Rev. 1912, No. 12, pp. 496–497.

<sup>92</sup> S. Goulding: *Principles of Company Law*, London 1996, p. 49; R.W. Hamilton, J.R. Macey, D.K. Moll: *Cases...*, *op. cit.*, pp. 213–214; F.H. Easterbrook: *Limited Liability and the Corporation*, The University of Chicago Law Review 1985, Vol. 52, p. 89.

<sup>93</sup> V. von Wachter: *The Corporate Veil*, New Law Journal 2007, Vol. 157, p. 990; P.L. Blumberg: *The Law of Corporate Groups: Procedural Problems in the Law of Parent and Subsidiary Corporations*, Boston–Toronto 1983, p. 8.

<sup>94</sup> Ch.S.A. Okoli: *English Courts Address the Potential Convergence between Doctrines of the Corporate Veil, Party Autonomy in Jurisdiction Agreements and Privity of Contract*, Journal of Business Law 2014, p. 252; S. Goulding: *Principles...*, *op. cit.*, p. 51; G.B. Born: *International...*, *op. cit.*, p. 1432; M.L. Moses: *The Principles...*, *op. cit.*, p. 39.

Afterwards, the doctrine was introduced to the realm of international commercial arbitration. Generally, it is accepted to pierce a corporate veil in a pursuit of extending the scope of an arbitration agreement, but only when a shareholder or a parent company performed an overwhelming or complete control over the company at the time when the main contract and arbitration agreement were concluded by that company, and such a control was used to commit fraud or cause harm to an entity that demands veil piercing<sup>95</sup>. For example, an undercapitalized subsidiary which does not have sufficient financial sources from the perspective of a type of conducted business enters into a contract with an arbitration clause, being under complete domination of its parent company, and exposes the other party to a great loss. Afterwards it transpires that the company's equity is not sufficient to redress such damage, even partially. In this case, veil piercing would rely on a claim of the aggrieved party that the parent company should take part in arbitration proceedings. W.W. Park gives an example of an entrepreneur who negotiates with the other party terms of the contract, and in the last minute before its conclusion convinces that party to enter into the contract, but with its subsidiary<sup>96</sup>.

When analysing the application of the doctrine in various jurisdictions, the conflicting attitudes towards the whole issue can be noticed. Some jurisdictions, e.g. the French one, are keen on applying the doctrine, while some other are rather reluctant, for instance the British one. Particular attention must be paid to two court decisions rendered in the same case *Dallah Real Estate v. The Ministry of Religious Affairs, Government of Pakistan*. The same arbitral award was reviewed by British<sup>97</sup> and French<sup>98</sup> courts. The case facts posed a question of whether an arbitration clause put in the contract between Dallah Company and a trust fund under a complete control of the Government of Pakistan, upon the liquidation of the fund, could bind the Government of Pakistan<sup>99</sup>. British courts held that there was no sufficient proof that the Government of Pakistan and Dallah were aware of a binding effect of the arbitration clause upon the Government and they had no intention to bind the Government with such an arbitration clause<sup>100</sup>. On the other hand, French courts decided that the trust fund established by the Government by means of a charter was in truth a unit that was performing tasks assigned to it by the Government, what justified the commencement of arbitration proceedings against the Government. British courts are rather willing to bind a non-signatory with an arbitration agreement

<sup>95</sup> M.L. Moses: *The Principles...*, op. cit., p. 39; *Bridas S.A.P.I.C. v. Government of Turkmenistan*, 345 F.3d at 352 (5<sup>th</sup> Cir. 2003) (USA).

<sup>96</sup> W.W. Park: *Arbitration...*, op. cit., p. 299.

<sup>97</sup> *Dallah Real Estate and Tourism Holding Company (Appellant) v. The Ministry of Religious Affairs, Government of Pakistan (Respondent)*, Supreme Court of the United Kingdom (3 November 2010), [2010] UKSC 46 (UK).

<sup>98</sup> *The Ministry of Religious Affairs, Government of Pakistan v. Dallah Real Estate and Tourism Holding Company*, Court of Appeal of Paris, judgment of 17 February 2011 (France).

<sup>99</sup> T. Várady, J.J. Barceló III, A.T. von Mehren: *International...*, op. cit., pp. 223–233.

<sup>100</sup> M.L. Moses: *The Principles...*, op. cit., p. 41.

invoking typical contract law solutions, whilst French courts are also open to the theories such as veil piercing or a group of companies<sup>101</sup>.

The doctrine of a group of companies from the point of view of the extension of an arbitration agreement was precisely explained in case *Dow Chemical*, where the arbitration panel held that the conclusion of the arbitration agreement by one company belonging to the group of companies may under the right circumstances extend the scope of the arbitration agreement over the other companies from the same group, even if they had not entered into such an arbitration agreement directly. The arbitral panel expressed an opinion that participation in the negotiations, conclusion, performance or termination of the main contract by other companies from the same group, operating as one business unit (single economic reality) as well as a mutual intention of the group members to be bound by the main contract and arbitration agreement could support an extension<sup>102</sup>. The group structure and the active involvement of non-signatories in the negotiation and execution of the particular contract must be such as to suggest that non-signatories and signatories have consented to arbitrate<sup>103</sup>. Scholars emphasize the role of the third party's consent. The third party should have the right to decide whether they want to be bound by the arbitration agreement<sup>104</sup>. The case facts should at least suggest that such a consent, even implied, existed (e.g. by the parties' conduct)<sup>105</sup>. Nonetheless, in case *Korsnas Marma* the Appellate Court in Paris ruled that an involvement in performance of the contract created an assumption that the parties should have known about arbitration clause in the contract<sup>106</sup>.

The group of companies doctrine has been recognized in France and Brazil<sup>107</sup>. On the contrary, generally it is not accepted in the UK<sup>108</sup> or Switzerland<sup>109</sup>. Regarding the above, the doctrine of a group of companies overlaps with the implied consent. It might happen that both bases would be applicable in one case<sup>110</sup>. Bearing in mind that it can compete under specific circumstances with other traditional theories

<sup>101</sup> *Ibidem*; T. Várady, J.J. Barceló III, A.T. von Mehren: *International...*, *op. cit.*, p. 234.

<sup>102</sup> S. Sołtysiński: *Związanie...*, *op. cit.*, p. 16; G.B. Born: *International...*, *op. cit.*, p. 1451; T. Várady, J.J. Barceló III, A.T. von Mehren: *International...*, *op. cit.*, pp. 217–218.

<sup>103</sup> S. Brekoulakis: *Parties...*, *op. cit.* [in:] S. Brekoulakis, J.D.M. Lew et al. (eds.): *The Evolution...*, *op. cit.*, p. 141.

<sup>104</sup> P. Fouchard, E. Gaillard, B. Goldman: *Fouchard, Gaillard, Goldman on International Commercial Arbitration*, Kluwer Law International 1999, p. 283; N. Blackaby, J.M. Hunter, C. Partasides, A. Redfern: *Redfern...*, *op. cit.*, p. 71.

<sup>105</sup> G.B. Born: *International...*, *op. cit.*, p. 1415.

<sup>106</sup> Judgment of 30 November 1988 in case *Korsnas Marma vs. Durand-Auzuas*, *Revue de l'arbitrage* 1989, p. 691 (France).

<sup>107</sup> *Trelleborg v. Anel*, São Paulo State Court of Appeals, Appeal no. 267.450.4/6-00, 7<sup>th</sup> Chamber of Private Law, decided on 24 May 2006 (Brazil).

<sup>108</sup> G.B. Born: *International...*, *op. cit.*, p. 1453; *Peterson Farms v. C&M Farming Ltd.* [2004] APP. L.R. 02/04, Arbitration, Practice and Procedure Law Reports [2004] EWHC 121 (Comm) 93 (UK); J. Leadley, L. Williams: *Peterson Farms: There is no Group of Companies Doctrine in English Law*, *International Arbitration Law Review* 2004, p. 111.

<sup>109</sup> Federal Tribunal judgment of 29 January 1996, *Saudi Butech Ltd. v. Saudi Arabian Saipem Ltd.*, 1996 Bull 3/1996, ASA 496–507 (Switzerland); G.B. Born: *International...*, *op. cit.*, p. 1453.

<sup>110</sup> M.L. Moses: *The Principles...*, *op. cit.*, p. 38.

related to the principles of contract law, the sceptics in first place would rather resort to these traditional (contractual) theories<sup>111</sup>. However, there is a noticeable paradigm shift when discussing a problem of consent in the light of the aforesaid doctrine. Beside factors proving real parties' intentions, arbitral tribunals sometimes pay more attention to other factors such as the need of security of international commercial relations or economic reality, which could be a serious departure from the *Dow Chemical* formula<sup>112</sup>. Although the group of companies doctrine is premised on a prerequisite of the existence of a corporate structure, it is treated as a consent-based theory, where at least parties' implied consent to arbitrate should appear, while the veil piercing doctrine is of equitable nature with the aim of preventing fraud or unfairness. Also both doctrines have different procedural consequences. Typically, piercing the corporate veil does not result in the extension of contractual obligations, including the obligation to arbitrate to an additional party, but leads to a replacement of the "sham" company by the shareholder<sup>113</sup>. Therefore, the shareholder must be a sole defendant in place of the company.

It is also necessary to touch upon a problem of corporate disputes and arbitration clauses included in articles of association or corporate by-laws. Arbitration clauses in articles of association are a specific category of arbitration agreements by reference<sup>114</sup>. Arbitration clauses in articles of association provide for the resolution of disputes by arbitration between a company and its members (shareholders) or disputes among its members (shareholders) when disputes which have arisen are related to the company's activity and are covered by the arbitration clause<sup>115</sup>. There is a serious discussion pending whether such a clause may bind other entities: corporate officers, corporate bodies, etc., although they have not signed it, or whether an arbitral award in such a case could have a binding effect over the other shareholders, who do not have to take part in arbitral proceedings. In Germany until 2009 problem of arbitrability of corporate disputes had been unsettled, as well as there was an unresolved problem of a binding effect of arbitral awards towards other shareholders and corporate officers, who have not taken part in arbitration<sup>116</sup>. Under § 248(1) of AktG<sup>117</sup> (that

<sup>111</sup> *Ibidem*.

<sup>112</sup> G.B. Born: *International...*, *op. cit.*, p. 1447; T. Várady, J.J. Barceló III, A.T. von Mehren: *International...*, *op. cit.*, p. 221; both authors cite the award in ICC Case no. 5103, 115 J.D.I. (*Clunet*) 1206 (1988).

<sup>113</sup> N. Voser: *Multi-party Disputes and Joinder of Third Parties* [in:] A.J. van den Berg (ed.): *50 Years of the New York Convention: ICCA Congress Series*, Vol. 14, The Hague 2009, p. 378.

<sup>114</sup> A.M. Steingruber: *Consent...*, *op. cit.*, p. 141.

<sup>115</sup> *Ibidem*.

<sup>116</sup> K. Pörnbacher, A. Dolgorukow: *Zdatność arbitrażowa sporów korporacyjnych (o zaskarżanie uchwał) — perspektywa niemiecka [Arbitrability of corporate disputes (an action for repealing resolutions) — a German perspective]* [in:] W. Jurcewicz, K. Pörnbacher, C. Wiśniewski (eds.), *Spory korporacyjne w praktyce arbitrażowej — perspektywa polska i niemiecka [Corporate disputes in arbitration practice — Polish and German perspective]*, Warsaw 2017, pp. 9–10.

<sup>117</sup> German Stock Corporation Act of 6 September 1965 (Federal Law Gazette I, p. 1089), as last amended by Article 5 of the Act of 10 May 2016 (Federal Law Gazette I, p. 1142), available at: [https://www.gesetze-im-internet.de/englisch\\_aktg/englisch\\_aktg.html#p1291](https://www.gesetze-im-internet.de/englisch_aktg/englisch_aktg.html#p1291) [accessed on 31.10.2018].

can be accordingly applied to a limited liability company<sup>118</sup>) inasmuch as the resolution adopted by a general assembly is declared null and void by a final and conclusive judgment, the judgment shall take effect for and against all stockholders as well as the members of the management board and of the supervisory board, even if they are not parties to the proceedings. The aforesaid provision gave rise to a question of whether an arbitral award declaring the resolution of the general assembly null and void could have the same effect as a court judgment towards other shareholders or corporate officers, although generally arbitration as a private method of dispute resolution can affect only its parties. In 2009 the Federal Supreme Court rendered a judgment in which it specified requirements as to the arbitration agreement which could allow extending of the scope of arbitral awards to all shareholders, even if they did not take part in arbitration regarding corporate dispute<sup>119</sup>. They are as follows: (1) all shareholders must agree for that method of corporate dispute settlement; (2) all shareholders and all corporate bodies must be informed about commencement and course of proceedings so they could participate in it; (3) all parties are entitled to participation in the selection of an arbitral panel; (4) arbitration agreement must guarantee that all corporate disputes stemming from it shall be handled by the same arbitration institution<sup>120</sup>. If arbitration clause did not have the aforesaid matters regulated, it would be deemed invalid<sup>121</sup>. The aforementioned solution is worth considering in the light of the Polish statutory measures, considering that nowadays Poland have struggled with the big dilemma of corporate disputes in arbitration and how to provide all stakeholders with equal rights in such proceedings.

Furthermore, it is worth analysing whether a joint and several liability related to a main debt covered by an arbitration clause might be a sufficient basis for extending the arbitration clause to the person who is jointly and severally liable. Generally, scholars are rather sceptical. The main reason is that the joint and several liability is independent from the main debt, it exists *vis-à-vis* the main obligation, therefore it cannot result in the extension of the arbitration clause<sup>122</sup>. As an example, one can invoke a guarantee or a surety<sup>123</sup>. As a starting point, a general statement must be made that the guarantor is not a party to the guaranteed contract, thus the guarantor is also not a privy to the arbitration agreement contained in the guaranteed contract<sup>124</sup>. However, some arbitral tribunals have held that guarantor could be bound by the

<sup>118</sup> W. Goette: *Zdatność arbitrażowa sporów o zaskarżanie uchwał w spółkach kapitałowych — rozwój orzecznictwa Sądu Najwyższego w Niemczech [Arbitrability of disputes encompassing action for repealing resolutions in companies — evolution of the case law of German Supreme Court]* [in:] W. Jurcewicz, K. Pörnbacher, C. Wiśniewski (eds.), *Spory korporacyjne...*, *op. cit.*, p. 56.

<sup>119</sup> Judgment of BGH of 6 April 2009, II ZR 255/08, NJW 2009, 1962, called *Arbitrability II* (Germany).

<sup>120</sup> K. Pörnbacher, A. Dolgorukow: *Zdatność arbitrażowa...*, *op. cit.* [in:] W. Jurcewicz, K. Pörnbacher, C. Wiśniewski (eds.), *Spory korporacyjne...*, *op. cit.*, pp. 15–17.

<sup>121</sup> *Ibidem*, p. 18.

<sup>122</sup> S. Brekoulakis: *Third Parties...*, *op. cit.*, pp. 93–94.

<sup>123</sup> *Ibidem*.

<sup>124</sup> *Ibidem*, p. 94; G.B. Born: *International...*, *op. cit.*, pp. 1459–1460.



arbitration clause in the guaranteed contract under specific circumstances, i.e. when the guarantor exercises assigned contractual rights after paying off a guaranteed debt, when the guarantor may provide a substitute performance under the guaranteed contract or when the guaranteed contract incorporates the terms of the main contract<sup>125</sup>.

When discussing the concept of the extension of the arbitration agreement, there is so little on requirements of a form of such agreement, although there are a lot of jurisdictions where the arbitration agreement must be drawn up in writing<sup>126</sup>. Potentially, if the arbitration agreement must be in writing otherwise null and void, its extension to non-signatories can violate such a condition. Some commentators explain that the potential requirements regarding the contract form cannot lead to irrational results or frustrate parties' legitimate expectations<sup>127</sup>. Sometimes, an international trade usage is also invoked<sup>128</sup>. The restrictive attitude to that issue would jeopardize the concept of *lex mercatoria*. Strict adherence to formal requirements regardless of real parties' intentions would contradict the construction of the arbitration agreement *in favorem validitatis*<sup>129</sup>.

However, there is a noticeable paradigm shift regarding the requirements of form. Some jurisdictions have started to liberalize the rigorous requirements of a written form of the arbitration agreement<sup>130</sup>, i.e. by also acknowledging e-mails<sup>131</sup>. The movement is evolving. It is worth mentioning that in 2006, the UNCITRAL Model Law was amended, and the requirement of the written form is also met in the case of electronic documents (Article 7(4))<sup>132</sup>. Concerning the problem of non-signatories and the form of the arbitration agreement, special attention must be drawn to a judgment of the Swiss Federal Tribunal of 16 October 2003, where the court held that a question of whether a non-signatory is bound by the arbitration agreement is an issue of determining the scope of the agreement. Consequently, a requirement of a written form of the arbitration agreement applies only to initial parties to the arbitration agreement and thus it is not an obstacle to extend its scope to non-signatories<sup>133</sup>. Contrarily, in the case of international arbitration agreements, Article 1507 of the French Code of Civil Procedure provides that an arbitration agreement shall not be subject to any requirements as to its form. Hence, if the existence of consent to arbitration is questioned, it will be for the courts or for the arbitral tribunal to

<sup>125</sup> G.B. Born: *International...*, *op. cit.*, p. 1461; *Kvaerner ASA & J.A. Jones, Inc. v. Bank of Tokyo-Mitsubishi*, 210 F.3d 262 (4<sup>th</sup> Cir. 2000) (USA).

<sup>126</sup> G.B. Born: *International...*, *op. cit.*, p. 1489; T. Várady, J.J. Barceló III, A.T. von Mehren: *International...*, *op. cit.*, p. 221.

<sup>127</sup> G.B. Born: *International...*, *op. cit.*, pp. 715–716.

<sup>128</sup> *Ibidem*, p. 1491.

<sup>129</sup> P. Lalive: *Transnational...*, *op. cit.*, p. 296.

<sup>130</sup> N. Blackaby, J.M. Hunter, C. Partasides, A. Redfern: *Redfern...*, *op. cit.*, pp. 75–77.

<sup>131</sup> W.W. Park: *Arbitration...*, *op. cit.*, pp. 300–301.

<sup>132</sup> The 2006 Amendments to the UNCITRAL Model Law on International Commercial Arbitration.

<sup>133</sup> Judgment of 16 October 2003, DFT 129 III 727 (Swiss Federal Tribunal); J.F. Poudret, S. Besson: *Comparative Law of International Arbitration*, London 2007, p. 221 with some critical remarks on that solution.

research the common intention of the parties at the time of the contract conclusion<sup>134</sup>. German law takes a different stand and adheres to strict statutory measures. German courts are keen on extending an arbitration clause to signatories only when applying traditional contractual theories such as an assignment<sup>135</sup>.

The question of form is not irrelevant because a purpose of establishing requirements as to the form is to record and depict real parties' intent and their consent to arbitration. As it has been mentioned previously, currently there is a wide discussion pending over the role of consent in international commercial arbitration. S. Brekoulakis proposes a new theory on non-signatories based on the concept of dispute rather than on the aforementioned contractual theories<sup>136</sup>. According to his theory, the following factors would be crucial: (1) whether a claim related to a non-signatory is inextricably implicated in a dispute (e.g. a surety's liability); (2) whether there is a close relationship between a non-signatory and a signatory; (3) whether there is a close interrelatedness between the main contract with an arbitration clause and claims by and against signatories and non-signatories<sup>137</sup>. Therefore, under this theory the requirement of mutual consent of all parties would be diminished. This concept is supposed to be a response to the problem of complex, multiparty cases. Scholars notice that traditional theories regarding non-signatories have origins in contract law. They could work out in the traditional, bipolar structure of arbitration. However, nowadays, when the economic reality is more complex, the traditional solutions do not have to fit in. Also A. Steingruber makes concessions to jurisdictional approach reminding about the jurisdictional side of arbitration<sup>138</sup>. Additionally, the author states that the term "consent" is a polymorph term, thus it does not have to mean "contract" but also a unilateral expression of consent<sup>139</sup>. Other authors would like to abandon the dogma of consent or minimize its role<sup>140</sup>. Others refer to a modern approach to consent, which is more pragmatic, more focused on facts with stronger emphasis on economic reality (B. Hanotiau)<sup>141</sup>.

### 3. POLAND

The arbitration agreement (arbitration clause) in Poland has been treated as a kind of a procedural agreement, similar e.g. to a jurisdiction clause placed in an

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<sup>134</sup> B. Hanotiau: *Consent...*, *op. cit.*, p. 547.

<sup>135</sup> *Ibidem*.

<sup>136</sup> S. Brekoulakis: *Third Parties...*, *op. cit.*, p. 198.

<sup>137</sup> S. Brekoulakis: *Rethinking...*, *op. cit.*, pp. 629–631.

<sup>138</sup> A. Steingruber: *Consent...*, *op. cit.*, p. 329.

<sup>139</sup> *Ibidem*, p. 330.

<sup>140</sup> D. Cohen: *Arbitrage et groupes de contrats*, *Rev. arb.* 1997, No. 2, pp. 477–478; J.M. Hosking: *Non-signatories...*, *op. cit.*, p. 302.

<sup>141</sup> B. Hanotiau: *Consent...*, *op. cit.*, p. 554.

underlying contract. Before an in-depth study on a problem of the extension of the arbitration agreement to non-signatories in Poland, some initial remarks must be made. Firstly, the author has made an assumption that under current Polish statutory measures the arbitration agreement should be assessed from the perspective of procedural rules (PCCP), and then accordingly with reference to substantive law regulations (especially contract law). Such a standpoint has been supported by a prevailing opinion of a vast majority of scholars nowadays. Resultantly, the author shall resort to the provisions of PCCP and PCC that could be compared with the aforesaid institutions created by the practice of international commercial arbitration. Secondly, due to a limited scope of this article, the author has not analysed the procedural problem of non-signatory participation in arbitration proceedings and manners in which non-signatories could pursue their right to join an arbitration agreement and consequently arbitration proceedings (e.g. through a joinder or an intervention). It is a wide and complex issue that demands more space, falling outside of the scope hereof.

The debate over the thesis of this publication should be started with a general statement that the arbitration agreement is binding upon the parties that have concluded such an agreement<sup>142</sup>. The extension of the arbitration agreement should be treated merely as an exception<sup>143</sup>. Under PCC provisions, the obligations stemming from a contract are relative<sup>144</sup> and effective *inter partes*<sup>145</sup>. Therefore, the rule is that they are not affecting third party's rights.

Even before World War II, a dispute had arisen among scholars in Poland on whether it would have been possible to extend a scope of an arbitration agreement to legal successors of original parties to the arbitration agreement. Some commentators were sceptical (e.g. Z. Fenichel)<sup>146</sup>, however, some others supported such a concept (e.g. J. Skąpski)<sup>147</sup>. Afterwards, the concept allowing binding legal successors with an arbitration agreement got a support from the Polish Supreme Court, which held that in the case of an assignment also an assignee could invoke the existence of an arbitration agreement that was originally concluded by an assignor and a debtor, not only against the assignor but also the debtor<sup>148</sup>. It is worth mentioning

<sup>142</sup> M. Tomaszewski [in:] A. Szumański (ed.), *Arbitraż...*, op. cit., p. 368; Ł. Błaszczak, M. Ludwik: *Sądownictwo...*, op. cit., p. 173; T. Ereciński, K. Weitz: *Sąd...*, op. cit., p. 146; G. Suliński: *Rozstrzyganie sporów ze stosunku spółki kapitałowej przez sąd polubowny* [Settlement of corporate disputes through arbitration in case of LLCs and joint-stock companies], Warsaw 2008, p. 28.

<sup>143</sup> G. Suliński: *Rozstrzyganie...*, op. cit., p. 29.

<sup>144</sup> P. Machnikowski: *Komentarz do art. 353 k.c.* [Commentary on Article 353 PCC] [in:] E. Gniewek, P. Machnikowski (eds.), *Kodeks cywilny. Komentarz* [Civil Code. Commentary], Warsaw 2016, Legalis.

<sup>145</sup> W. Borysiak: *Komentarz do art. 353 k.c.* [Commentary on Article 353 PCC] [in:] K. Osajda (ed.), *Kodeks cywilny. Komentarz* [Civil Code. Commentary], Warsaw 2017, Legalis.

<sup>146</sup> Z. Fenichel: *Czy prawa i obowiązki natury procesowej przechodzą na prawnonabywców?* [May the rights and duties of procedural nature be transferred to the successors?], *Przegląd Sądowy* 1930, No. 3, p. 73–74.

<sup>147</sup> J. Skąpski: *W kwestii mocy obowiązującej zapisu na sąd polubowny dla cesjonariusza stron* [On effectiveness of an arbitration agreement for assignees], *Polski Proces Cywilny* 1934, No. 16–17, pp. 500–504.

<sup>148</sup> Judgment of the Supreme Court of 8 February 1935, III C 778/34, OSNC 1935, No. 11, item 430 (Poland).

that before World War II it was well-settled that when the parties agreed to arbitrate, they did not submit themselves personally to the arbitration but a dispute arising out of a contract they had concluded<sup>149</sup>. Resultantly, that statement was the basis for further conclusion, that the arbitration agreement binds legal successors, regardless of whether the succession is singular or universal. Additionally, T. Ereciński and K. Weitz point out that the obligation to arbitrate also passes by means of procedural subrogation to an executor of an estate (Article 988 § 2 PCC)<sup>150</sup>. Also a trustee in bankruptcy will be obliged to go to arbitration in place of a bankrupt.

Under Article 1161 § 1 PCCP, a conclusion of an arbitration agreement requires to specify the subject matter of a dispute or at least a contractual relationship from which the dispute has arisen or may arise in the future. Therefore, it is impossible to submit to arbitration all disputes that may arise among the parties. Such wording of the aforesaid provision supports the point of view that the subjects of the main contract and the arbitration agreement should be treated separately from the original parties that concluded them. Under Polish regulations, the arbitration agreement is valid when it (1) specifies the parties to the arbitration agreement, (2) contains parties' declaration of will to submit a dispute to arbitration, (3) specifies a dispute or contractual relationship from which a dispute may arise. Furthermore, some other provisions allow to bind with an arbitration agreement a wider group of entities than just the original signatories. Under Article 1163 § 1 PCCP an arbitration agreement contained in an agreement or articles of association of a partnership or a corporation concerning disputes arising out of such corporate relationship shall be binding upon the partnership or corporation and its partners or shareholders. Participation in a partnership or corporation of partners or shareholders, both former and present, means also becoming the party to such an arbitration agreement (clause)<sup>151</sup>. Moreover, commentators in Poland have commenced a discussion on whether there is a hypothetical possibility to extend the scope of an arbitration clause included in articles of association to members of the management board<sup>152</sup>. The attitudes to that matter are not unanimous. That shall be analysed hereinafter.

For the purpose of clarifying deliberations over the pattern, it is necessary to categorize grounds that could be the basis for extending the scope of an arbitration agreement to non-signatories in the light of scholars' present opinions. First and

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<sup>149</sup> J. Skąpski: *W kwestii mocy...*, *op. cit.*, p. 500; M. Tomaszewski [in:] A. Szumański (ed.), *Arbitraż...*, *op. cit.*, p. 369; A. Wiśniewski: *Międzynarodowy...*, *op. cit.*, p. 471; Ł. Błaszczak, M. Ludwik: *Sądownictwo...*, *op. cit.*, p. 127; T. Ereciński, K. Weitz: *Sąd...*, *op. cit.*, pp. 149–150; S. Dalka: *Sądownictwo...*, *op. cit.*, p. 75; R. Kulski: *Umowy procesowe...*, *op. cit.*, p. 251.

<sup>150</sup> T. Ereciński, K. Weitz: *Sąd...*, *op. cit.*, pp. 150–151.

<sup>151</sup> M. Tomaszewski [in:] A. Szumański (ed.), *Arbitraż...*, *op. cit.*, p. 372; A. Wiśniewski: *Międzynarodowy...*, *op. cit.*, p. 489; T. Ereciński, K. Weitz: *Sąd...*, *op. cit.*, p. 147.

<sup>152</sup> G. Żmij [in:] B. Gessel-Kalinowska vel Kalisz, *Diagnoza arbitrażu. Funkcjonowanie prawa o arbitrażu i kierunki postulowanych zmian [Arbitration diagnosis. The functioning of arbitration law and directions of proposed changes]*, Wrocław 2014, pp. 90–91.

foremost, the doctrine invokes a succession, both universal and singular<sup>153</sup>. It encompasses the succession of inheritance, the assignment of receivables, the acquisition of debt, the transfer of contractual position, the transformation (a division or a merger) of corporation. The second category covers those which rely upon a special relationship between a non-signatory and a main contract. That will be a contract for performance to a third party, a guarantee/surety, a joint and several liability and an arbitration clause in a partnership agreement or articles of association with a binding effect for shareholders and officers. That category is pretty universal and may contain a wide range of grounds, incompatible with each other at first glance. Also, a concept of an implied authority (analysed by A. Wiśniewski) may fall within the scope of that category<sup>154</sup>. The concept of implied authority seems to reflect a common law agency theory, or more specifically, apparent authority. The last, third category, and the most controversial one, concerns the abuse of corporate (legal) personality, the abuse of substantive rights or the doctrine of a group of companies<sup>155</sup>. *Prima facie*, it seems that the last category covers the grounds that are merely an attempt at implementing veil piercing or the doctrine of a group of companies to the Polish legal system<sup>156</sup>. They are widely commented and deemed controversial. Attitudes towards them are conflicting and ambiguous. There is also a lack of court decisions on that pattern. However, generally they have been questioned by a vast majority of commentators, what will be also analysed at a further stage.

### 3.1. UNIVERSAL AND SINGULAR LEGAL SUCCESSION

According to scholars, an arbitration agreement can be passed on to another person by means of singular succession that encompasses a transfer of particular rights stemming from the contract and by means of universal succession<sup>157</sup>. Univer-

<sup>153</sup> Ł. Błaszczak, M. Ludwik: *Sądownictwo...*, *op. cit.*, p. 127; G. Suliński: *Rozstrzyganie...*, *op. cit.*, p. 29.

<sup>154</sup> A. Wiśniewski: *Międzynarodowy...*, *op. cit.*, pp. 478–480.

<sup>155</sup> A. Wiśniewski proposes to group situations under which the extension can occur into three categories: (1) those where a third party's consent has been expressed in a different manner than by signing a document (i.e. by reference), (2) those where legal succession exists, and (3) those where the binding effect exists because of objective criteria, e.g. participation in performance of a contract or being a part of a holding group, etc. (A. Wiśniewski: *Międzynarodowy...*, *op. cit.*, pp. 470–471); T. Ereciński and K. Weitz categorise such situations as follows: (1) where third parties have not concluded a contract, (2) where third parties are bound by an arbitration agreement because of legal succession, (3) other instances (T. Ereciński, K. Weitz: *Sąd...*, *op. cit.*, pp. 146–147).

<sup>156</sup> A. Wiśniewski: *Nadużycie prawa podmiotowego jako podstawa rozciągnięcia zapisu na sąd polubowny na podmioty powiązane kapitałowo* [Abuse of substantive law as the basis for extension of an arbitration agreement to other entities due to capital relations and corporate governance], *Problemy Prawa Prywatnego Międzynarodowego* 2013 Vol. 13, p. 10.

<sup>157</sup> K. Weitz [in:] T. Ereciński (ed.), *Kodeks postępowania cywilnego. Komentarz. Międzynarodowe postępowanie cywilne. Sąd polubowny* [Code of Civil Procedure. Commentary. International civil procedure. Arbitration], Vol. 6, Warsaw 2017, p. 857; M. Tomaszewski [in:] A. Szumański (ed.), *Arbitraż...*, *op. cit.*, pp. 369–372; Ł. Błaszczak, M. Ludwik: *Sądownictwo...*, *op. cit.*, p. 127; T. Ereciński, K. Weitz: *Sąd...*, *op. cit.*, p. 148; S. Dalka: *Sądownictwo...*, *op. cit.*, p. 75; M. Mazur: *Moc...*, *op. cit.*, p. 51.



sal succession pertains to transfer of all rights and duties (including contractual obligations) from one entity to another through, e.g. the succession of inheritance or the transformation of a corporation<sup>158</sup> and regardless of the fact, that the arbitration agreement (arbitration clause) is separate and autonomous from the main contract. By universal succession the transfer of rights and duties covers both the main contract and the arbitration agreement. By contrast, examples of singular succession have been given as follows: an assignment, the acquisition (assumption) of debt or the transfer of a contractual position including both rights and duties<sup>159</sup>. They concern the main contract, and there is a serious question of whether in the light of severability of the arbitration clause they can also embrace the arbitration agreement (arbitration clause). In other words, whether the arbitration agreement follows substantive obligations resulting from the main contract, e.g. in the case of assignment.

On the one hand, an arbitration agreement is separate and independent from the main contract. On the other hand, the scope of that rule is not unlimited and of absolute nature, because the arbitration agreement is always somehow related to some other contractual relationship<sup>160</sup>. Article 1180 § 1 PCCP stipulates that invalidity or expiration of the main contract in which the arbitration agreement is included shall not in and of itself mean the invalidity or expiration of the arbitration agreement. The aforesaid provision is analogous to the provisions of the UNCITRAL Model Law<sup>161</sup>, or to the provisions regulating the severability of the arbitration clause in other countries (e.g. in France)<sup>162</sup>. Therefore, a problem of autonomy of arbitration clauses often appears in the context of nullity of the main contract and the impact of such nullity on further existence of the arbitration clause. The purpose of this regulation is to not allow the nullity of the main contract to deprive the arbitration panel of its competence to resolve the dispute resulting from that contract<sup>163</sup>. There is a strong link between the severability doctrine and the competence-competence doctrine<sup>164</sup>. That issue has been analysed by Polish jurisprudence. Some scholars claimed that an arbitration agreement in a main contract is one of the features of a contractual obligation stemming from the main contract<sup>165</sup>, what means that alongside the assignment of a contractual relationship, an assignee becomes also bound

<sup>158</sup> A. Wiśniewski: *Międzynarodowy...*, *op. cit.*, pp. 471–472; S. Dalka: *Sądownictwo...*, *op. cit.*, p. 75; R. Kulski: *Umowy procesowe...*, *op. cit.*, pp. 251–252; A. Budniak-Rogała: *Charakter...*, *op. cit.*, p. 472.

<sup>159</sup> M. Tomaszewski [in:] A. Szumański (ed.), *Arbitraż...*, *op. cit.*, pp. 370–371; A. Wiśniewski: *Międzynarodowy...*, *op. cit.*, pp. 472–473.

<sup>160</sup> G.B. Born: *International...*, *op. cit.*, pp. 1468–1469.

<sup>161</sup> UNCITRAL Model Law on International Commercial Arbitration of 1985.

<sup>162</sup> Article 1447 of the French Civil Proceedings Code.

<sup>163</sup> J.J. Barceló III: *Who Decides the Arbitrators' Jurisdiction? Separability and Competence-Competence in Transnational Perspective*, *Vanderbilt Journal of Transnational Law* 2003, Vol. 36, No. 4, p. 1116; T. Ereciński, K. Weitz: *Sąd...*, *op. cit.*, pp. 148–149.

<sup>164</sup> J.J. Barceló III: *Who Decides...*, *op. cit.*, p. 1116.

<sup>165</sup> T. Ereciński, K. Weitz: *Sąd...*, *op. cit.*, p. 148; A. Budniak-Rogała: *Charakter...*, *op. cit.*, p. 476; J. Zralek, W. Kurowski: *Wpływ przelewu wierzytelności na klauzulę arbitrażową [Impact of the assignment of receivables on an arbitration clause]*, *ADR. Arbitraż i Mediacja* 2008, No. 3, pp. 144–147.

by the arbitration agreement stemming originally from the contract between the assignor and debtor<sup>166</sup>. Nowadays, in Poland it is widely accepted that by the assignment of receivables an arbitration agreement follows the assignment, although it is separate<sup>167</sup>.

In the context of an assignment, two provisions must be taken into consideration: Articles 509 and 513 PCC. The concept of the assignment is premised on a principle that it cannot put a debtor in a worse position than before the assignment<sup>168</sup>. According to Article 509 § 1 PCC, a creditor without a debtor's permission may confer the receivables upon a third person, unless it breaches the law, contractual stipulation or the nature of the contract. Additionally, alongside the receivables, all other rights related to them are conferred upon the third person (an assignee)<sup>169</sup>. Scholars note that such a provision is the basis for extending the arbitration agreement included in a container contract to an assignee<sup>170</sup>. The arbitration clause in this case is treated as an ancillary right. Nevertheless, some authors criticize such a construction of the aforesaid provision claiming that the arbitration clause cannot be seen as an ancillary right<sup>171</sup>, therefore they propose a different solution, i.e. to treat the arbitration clause as a feature of a main obligation<sup>172</sup>. A purpose of the assignment is to pose an assignee in the same legal situation as their predecessor (assignor). However, at this point, the debtor's position must also be considered. That is an issue regulated by Article 513 § 1 PCC, which sets forth that a debtor is entitled to claim all defences and objections towards an assignee which they had towards an assignor on the date of receiving information about the assignment. As many scholars believe, the words "all defences and objections" mean also an arbitration agreement<sup>173</sup>. Such a point of view was also adopted by the Polish Supreme Court<sup>174</sup>. Nevertheless, recently some commentators have expressed an opinion that Article 513 § 1 PCC should not be construed so widely. Some of them point out that this provision is applicable only in one case: where an assignee sues a debtor before a state court, and the debtor raises an objection claiming the existence of an arbitration agreement. In the opposite direction, when an assignee sues a debtor in arbitration, the debtor could claim that the arbitration agreement was binding only upon the

<sup>166</sup> G.B. Born: *International...*, *op. cit.*, p. 1469.

<sup>167</sup> A. Wiśniewski: *Międzynarodowy...*, *op. cit.*, pp. 473–474; Ł. Błaszczak, M. Ludwik: *Sądownictwo...*, *op. cit.*, p. 127; S. Dalka: *Sądownictwo...*, *op. cit.*, p. 75.

<sup>168</sup> K. Zagrobelny [in:] E. Gniewek (ed.), *Kodeks cywilny. Komentarz [Civil Code. Commentary]*, Warsaw 2008, p. 929; R. Kulski: *Umowy procesowe...*, *op. cit.*, p. 258.

<sup>169</sup> M. Tomaszewski [in:] A. Szumański (ed.), *Arbitraż...*, *op. cit.*, p. 370; R. Kulski: *Umowy procesowe...*, *op. cit.*, p. 258; A. Budniak-Rogała: *Charakter...*, *op. cit.*, p. 475.

<sup>170</sup> M. Tomaszewski [in:] A. Szumański (ed.), *Arbitraż...*, *op. cit.*, p. 370; T. Ereciński, K. Weitz: *Sąd...*, *op. cit.*, p. 150.

<sup>171</sup> J. Zralek, W. Kurowski: *Wpływ...*, *op. cit.*, p. 144.

<sup>172</sup> *Ibidem*, pp. 145–146.

<sup>173</sup> M. Tomaszewski: *Umowa...*, *op. cit.*, p. 18; M. Tomaszewski [in:] A. Szumański (ed.), *Arbitraż...*, *op. cit.*, p. 370.

<sup>174</sup> Judgment of the Supreme Court of 3 September 1998, I CKN 822/97 (Poland).

debtor and assignor<sup>175</sup>. Thus, under this theory, an objection as to the existence of an arbitration agreement could be raised only before a state court. However, in the opposite way, where the assignee would first go to arbitration, the defendant could challenge the competence of an arbitration panel<sup>176</sup>. Such a standpoint has been criticized due to the unjust results it could bring<sup>177</sup>. Nonetheless, regarding the aforementioned argumentation, the authors of that theory propose as a remedy to such a flaw to treat an arbitration agreement as a permanent feature of a main obligation, instead of transferring an arbitration clause through assignment<sup>178</sup>.

There is also another standpoint challenging the aforesaid rule that “all defences and objections” should cover also an objection as to the existence of an arbitration agreement. Some commentators point out that Article 513 § 1 PCC is a matter of substantive law, and it does not concern an arbitration agreement. However, even adoption of such an idea does not deprive debtors of the rights stemming from the arbitration agreement. However, it is not a question of Article 513 § 1 PCC but rather solely of the features of the arbitration agreement and the fact that this agreement refers to a dispute itself and it does not have to bind the same parties that concluded such agreement<sup>179</sup>. Nevertheless, the opinion remains beyond discussion that at the moment of assignment an assignee is bound without any restraints by the arbitration agreement that an assignor has previously been bound by<sup>180</sup>. Summing up, in case of the assignment, the arbitration agreement becomes binding upon both the debtor and the assignee<sup>181</sup>. Howbeit, K. Weitz precisely explains that not it is not the assignment itself, but rather an act of law capable of causing the assignment that would bind an assignee with an arbitration agreement<sup>182</sup>.

<sup>175</sup> J. Zralek, W. Kurowski: *Wpływ...*, *op. cit.*, p. 144.

<sup>176</sup> *Ibidem*.

<sup>177</sup> M. Tomaszewski [in:] A. Szumański (ed.), *Arbitraż...*, *op. cit.*, pp. 370–371.

<sup>178</sup> J. Zralek, W. Kurowski: *Wpływ...*, *op. cit.*, p. 144.

<sup>179</sup> A. Wiśniewski: *Międzynarodowy...*, *op. cit.*, pp. 473–474.

<sup>180</sup> M. Tomaszewski [in:] A. Szumański (ed.), *Arbitraż...*, *op. cit.*, p. 370; A. Wiśniewski: *Międzynarodowy...*, *op. cit.*, p. 475.

<sup>181</sup> Ł. Błaszczak, M. Ludwik: *Sądownictwo...*, *op. cit.*, p. 127; T. Ereciński, K. Weitz: *Sąd...*, *op. cit.*, pp. 149–150.

<sup>182</sup> The author specifies that, although it is well-settled that an assignment could bind a non-signatory with an arbitration clause, the concept has not been deeply analysed yet. It is premised on an assumption that assignment is always effective and valid. Nevertheless, it has a flaw when facing the problem of ineffective assignment. From a substantive law perspective also the transfer of an arbitration clause should remain ineffective. Therefore, K. Weitz proposes to look at the problem from the perspective of procedural law (Article 192(3) PCCP), when the subject of the dispute has been alienated during the trial. Although the assignor is not entitled to receivables anymore from the substantive law perspective, they still are a party to the court proceedings. Thus, in the case of the assignment a legal act capable of transferring the right is sufficient to extend the arbitration clause, regardless of whether the incorporated right has really been transferred. The same philosophy could be applied to other bases related to singular succession (e.g. the assumption of debt); K. Weitz: *Następstwo prawne a związanie zapisem na sąd polubowny* [Legal succession and binding effect of an arbitration agreement], *ADR. Arbitraż i Mediacja* 2011, No. 4, pp. 121–124; K. Weitz: *Następstwo prawne w zakresie przedmiotu sporu w toku postępowania przed sądem polubownym* [Legal succession during arbitration proceedings], *Problemy Prawa Prywatnego Międzynarodowego* 2012, No. 1, pp. 53–54.

An issue similar to the aforesaid problem is that of binding effect of an arbitration agreement in the case of an assumption of debt<sup>183</sup>. Yet, it must be mentioned that under Polish law, the assumption of debt always requires both a debtor's and creditor's permission. According to Article 519 § 1 PCC, a third person can replace a debtor who at the same time is released from the obligation. However, an assumption of debt can occur in two manners: (1) a creditor may enter into agreement with a third party, and here a debtor's consent is required; (2) a debtor may enter into agreement with a third party for an assumption of debt, and in this case a creditor's consent is required (Article 519 § 2(1) and (2) PCC). Under Article 524 § 1 PCC, the third person that is taking over the debt is entitled to raise against the creditor all defences and objections to which the former debtor has been entitled, except for a set-off against the former debtor's receivables. This provision suggests that except for the set-off, all other defences and objections can be raised by the new debtor against the creditor, including an arbitration agreement<sup>184</sup>. The jurisprudence holds that such a wording of a provision proves that the arbitration agreement is equally effective both to the creditor and the new debtor<sup>185</sup>. If the provision were understood in a different way, it could cause inequality between parties to the contract. In addition, it is necessary to touch upon a problem of subrogation as a possible basis for the extension of an arbitration agreement. The Polish Supreme Court expressed that in the case of insurers, who are subrogated to the rights of the insured under Article 828 § 1 PCC, they are also entitled to invoke (and bound by) the arbitration clause of the insured's main contract. This is a consequence of a rule that the provisions regarding assignment are accordingly applicable to the subrogation<sup>186</sup>. Nevertheless, in the same judgment the Polish Supreme Court pointed out that an arbitration clause in this situation must be scrutinized carefully, because any kind of constraints in the arbitration clause as to its personal scope might prevent any transfer to third persons<sup>187</sup>.

This Article also pointed to a transfer of contractual position to a third party as a basis for extending an arbitration agreement to non-signatories<sup>188</sup>. In Polish law, the transfer of a contractual position under one legal title (legal basis) does not exist. It always takes place as a legal act covering both: an assignment of receivables incorporating a bunch of rights from the contract and an assumption of debt which incorporates a category of parties' obligations. Given that, the arbitration agreement follows the transfer of contractual position to a new party to the contract. The aforementioned bases could be compared also with those where other entities perform the parties' right stemming from the contract on their behalf. As example, a public

<sup>183</sup> T. Ereciński, K. Weitz: *Sąd...*, *op. cit.*, p. 148; A. Wiśniewski: *Międzynarodowy...*, *op. cit.*, p. 472.

<sup>184</sup> M. Tomaszewski [in:] A. Szumański (ed.), *Arbitraż...*, *op. cit.*, p. 370.

<sup>185</sup> A. Wiśniewski: *Międzynarodowy...*, *op. cit.*, p. 472.

<sup>186</sup> Judgment of the Supreme Court of 7 November 2013, V CSK 545/12 (Poland).

<sup>187</sup> *Ibidem*.

<sup>188</sup> T. Ereciński, K. Weitz: *Sąd...*, *op. cit.*, p. 148.

prosecutor would be bound by an arbitration agreement concluded by the party on whose behalf they file a claim. Still, the dispute also must be covered by the arbitration agreement. Consequently, as long as the public prosecutor aims to pursue the party's right, the arbitration agreement can effectively prevent them from proceedings before a state court<sup>189</sup>.

### 3.2. CONTRACT FOR PERFORMANCE TO A THIRD PARTY

Another interesting issue is a consequence of placing an arbitration agreement in a main contract which also stipulates performance to a third party. Commentators accept such a situation as a basis for extending the scope of the arbitration agreement<sup>190</sup>. In this particular case, both actual parties to the contract as well as a third party are bound by the arbitration agreement<sup>191</sup>. A problem of the contract for a performance to a third party has been regulated in Article 393 § 1–3 PCC. Under that contract, a debtor undertakes before a creditor to perform the contract for the benefit of a third party. The third party has a direct claim to the debtor for the performance of the contract<sup>192</sup>. For example, it might be a contract between a guarantor and an entity rendering a warranty work for providing such a work to an entitled third person that has a claim towards the guarantor for warranty services<sup>193</sup>. Of course, the parties in that contract can shape their mutual obligations in a different way, e.g. only by authorizing the third person to receive a consideration without providing that person with direct claims towards the debtor for the contract performance<sup>194</sup>. However, if the parties do not stipulate otherwise, the contract for performance to the third party shall include the aforesaid claim and entitle the third party to demand the contract performance. Regarding the arbitration agreement and the possibility of raising an objection before the court as to its existence the detailed attention must be paid to Article 393 § 3 PCC, under which a debtor can raise defences and objections stemming from the contract to a third party. The provision sets forth that the debtor can raise both defences and objections regarding the contract with the

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<sup>189</sup> *Ibidem*, p. 151; A. Zieliński [in:] A. Zieliński, K. Flaga-Gieruszyńska (eds.), *Kodeks postępowania cywilnego. Komentarz* [Code of Civil Procedure. Commentary], Warsaw 2016, p. 46.

<sup>190</sup> However, recently some critical remarks have been made: G. Pobożniak, K. Ściborowski: *Zmiany podmiotowe umowy prawa materialnego a zakres związania klauzulą arbitrażową* [Changes among parties to a substantive law contract and personal scope of an arbitration clause], e-Przegląd Arbitrażowy 2017, No. 1–2, p. 10.

<sup>191</sup> M. Tomaszewski [in:] A. Szumański (ed.), *Arbitraż...*, *op. cit.*, p. 371; A. Wiśniewski: *Międzynarodowy...*, *op. cit.*, p. 474; T. Ereciński, K. Weitz: *Sąd...*, *op. cit.*, p. 147; contrarily and sceptically over that solution: P. Wrześniewski: *Charakter prawny zapisu na sąd polubowny* [Legal nature of an arbitration agreement], Oficyna Wydawnicza 2011, p. 119.

<sup>192</sup> P. Machnikowski: *Komentarz do art. 393 k.c.* [Commentary on Article 393 PCC] [in:] E. Gniewek, P. Machnikowski (eds.), *Kodeks...*, *op. cit.*, Legalis 2016.

<sup>193</sup> Resolution of the Supreme Court of 29 March 1979, III CZP 9/79 (Poland).

<sup>194</sup> P. Machnikowski: *Komentarz do art. 393 k.c.* [in:] E. Gniewek, P. Machnikowski (eds.), *Kodeks...*, *op. cit.*, Legalis 2016.



creditor and the contract with the third party. On the contrary, the debtor cannot invoke any claims related to the contract between the third party and the creditor. Commentators, as examples for such defences and objections, quote a situation where the debtor is entitled to claim a set-off, a prescription, or a nullity of a main contract, etc.<sup>195</sup> Therefore, the scholars mostly invoke defences related to the substantive law. Nevertheless, the doctrine points out that there could be as well the claims and defences concerning governing law or a method of dispute settlement<sup>196</sup>. Resultantly, in case a third person sues a debtor before a state court, the debtor may effectively raise an objection as to the existence of the arbitration agreement. However, as a consequence of that, regarding a teleological interpretation and a purpose of this provision, the third party should also be entitled to sue the debtor before the arbitration panel, not just be obliged to accept such objection launched by the debtor before the state court.

Some theorists cast doubt on that solution, pointing to the severability doctrine and independence of an arbitration agreement from a main contract. They say that the arbitration clause in a container contract is not a part of that contract, but rather a separate agreement. Consequently, the binding effect of the arbitration agreement upon a third party should rather be explained by a functional link between the arbitration agreement and the main contract, not the fact that it is an additional, contractual stipulation<sup>197</sup>. Apart from the approach towards that problem, there is a wide acceptance that the arbitration agreement in the container contract binds a debtor, a creditor and a third party for whose benefit the contract should be performed. However, in case if the debtor and creditor modified the content of the contract, e.g. granted the third party a right to receive a consideration without a right to launch a claim, the arbitration clause would not bind that third party. It stems plainly from the fact that in this event Article 393 § 3 PCC cannot be applied. Such a comment is of little importance at this point because the third person under such circumstances would not act on their behalf, but merely as a person authorized by the creditor and acting on the creditor's behalf. Thus, they do not play an independent role in this contractual relationship.

### 3.3. SURETY AND JOINT AND SEVERAL LIABILITY

In the light of several remarks made above, an issue of extending an arbitration agreement to a surety or a person jointly and severally liable for a debt which stems from a main contract covered by the arbitration agreement seems to be an important

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<sup>195</sup> *Ibidem*.

<sup>196</sup> M. Tomaszewski [in:] A. Szumański (ed.), *Arbitraż...*, *op. cit.*, p. 372; M. Tomaszewski: *Umowa...*, *op. cit.*, p. 18; T. Ereciński, K. Weitz: *Sąd...*, *op. cit.*, p. 147.

<sup>197</sup> A. Wiśniewski: *Międzynarodowy...*, *op. cit.*, p. 474.

tenet<sup>198</sup>. Generally, under Polish law joint and several liability cannot constitute grounds for binding non-signatories with an arbitration agreement<sup>199</sup>. Courts note that such a liability is independent of a main obligation. What can serve as an example under Polish law is a joint liability of an investor together with a general contractor towards subcontractors in a contract for construction works. According to Article 647<sup>1</sup> § 1 PCC (after the latest amendments)<sup>200</sup>, an investor shall bear joint and several liability together with a (general) contractor for the payment of remuneration for construction works performed by subcontractors. Nevertheless, the detailed scope of works which are supposed to be performed by the subcontractors must be passed on by the (general) contractor to the investor. The last amendments to the Polish contract law have specified in detail the problem of the investor's liability. Under the new provisions such a liability, though joint and several with the (general) contractor's liability, could be curbed under specific circumstances (Article 647<sup>1</sup> § 3 PCC). The detailed scrutiny over the investor's liability is not a problem hereof. However, this provision is still a source of the investor's joint and several liability for remuneration to subcontractors for construction works. Hence, a serious question appears whether an arbitration agreement may be binding upon the investor if it is included in the contract between the contractor and the subcontractor. Lastly, commentators have given a negative answer on that matter<sup>201</sup>. First, it has been pointed out that the investor is liable only for remuneration, thus such an obligation cannot be extended over a catalogue of the other contractor's obligations stemming from the contract<sup>202</sup>. Additionally, it has been emphasized that it is not the investor's own obligation, but rather a contractual relationship similar to a surety, existing next to the main contractor's obligation<sup>203</sup>. Generally, commentators hold that an arbitration agreement drawn up for disputes resulting from a specific contract between a debtor and a creditor does not reach a surety, a guarantor or persons severally and jointly liable<sup>204</sup>. The reason for such a thesis is the fact that the surety contract does not introduce the surety into a contractual relationship between the guaranteed party and the counterparty<sup>205</sup>.

<sup>198</sup> M. Tomaszewski [in:] A. Szumański (ed.), *Arbitraż...*, *op. cit.*, p. 373; A. Wiśniewski: *Międzynarodowy...*, *op. cit.*, p. 473; T. Ereciński, K. Weitz: *Sąd...*, *op. cit.*, p. 151; R. Kulski: *Umowy procesowe...*, *op. cit.*, p. 256.

<sup>199</sup> T. Ereciński, K. Weitz: *Sąd...* *op. cit.*, p. 151.

<sup>200</sup> Act of 7 April 2017 on amendments to some legal acts with a purpose of facilitating the recovery of receivables (Journal of Laws of 2017, item 933).

<sup>201</sup> E. Gapska: *Skuteczność zapisu na sąd polubowny zawartego w umowie podwykonawczej wobec inwestora ponoszącego odpowiedzialność solidarną na podstawie art. 647<sup>1</sup> § 5 k.c.* [Effectiveness of an arbitration clause contained in a contract with a subcontractor for an investor bearing joint and several liability under Article 647<sup>1</sup> § 5 PCC], *Przegląd Prawa Handlowego* 2017, No. 1, p. 43.

<sup>202</sup> *Ibidem*, p. 41.

<sup>203</sup> *Ibidem*, p. 42.

<sup>204</sup> A. Wiśniewski: *Międzynarodowy...*, *op. cit.*, p. 473; T. Ereciński, K. Weitz: *Sąd...*, *op. cit.*, p. 151; R. Morek: *Komentarz do art. 1161 k.p.c.* [Commentary on Article 1161 PCCP] [in:] E. Marszałkowska-Krześ (ed.), *Kodeks postępowania cywilnego. Komentarz* [Code of Civil Procedure. Commentary], Warsaw 2017, Legalis; resolution of the Supreme Court of 13 July 2011, III CZP 36/11 (Poland).

<sup>205</sup> G.B. Born: *International...*, *op. cit.*, p. 1460.

However, such a point of view has been complemented by a comment that the surety or the jointly and severally liable person can join such an arbitration agreement. M. Tomaszewski claims that in the case, e.g. if the surety joined an arbitration agreement, the creditor could at their own discretion sue the guarantor before an arbitration court or a state court<sup>206</sup>. No doubt, such a solution protects the interests of guarantors, sureties or persons jointly and severally liable, who do not have to be necessarily interested in solving the dispute with the creditor before an arbitration panel.

The author of this publication also thinks that another interpretation, a little bit wider, could be introduced on the basis of the PCC provisions regarding a contract of surety. Under Article 876 § 1 PCC, the contract of surety means that a surety undertakes to perform an obligation stemming from the contract to the creditor if the debtor has not performed it. It creates a joint and several liability. Moreover, according to Article 883 § 1 PCC a surety may raise all defences and objections against the creditor to which the debtor is entitled, especially those regarding a set-off. Such a regulation is quite similar to the problem of the arbitration agreement and assignment, where the debtor is entitled to claim all defences and objections towards an assignee which they have had towards an assignor (Article 513 § 1 PCC). As scholars have noticed, a surety creates a liability of an auxiliary (secondary) nature, closely related to a main debt<sup>207</sup>. It can be said that the surety's liability follows the existence of a guaranteed debt. A nullity of a main debt affects the validity of a surety<sup>208</sup>. Therefore, it is not entirely an independent legal relationship. The surety's position has been shaped by two provisions: Article 879 § 1 and Article 883 § 1 PCC. The first one stipulates that a scope of a surety's liability is determined by the status of a debtor's liability at any time<sup>209</sup>. Furthermore, Article 883 § 1 PCC provides that the surety may raise all defences and objections against the creditor to which the debtor is entitled, especially the surety may set off the debtor's receivables against the creditor's ones.

These two provisions practically put the surety in the debtor's legal position. Thus, their debts are co-extensive and derivative. Although the surety is liable for someone's debt and it is not their obligation, this legal situation resembles that of a person who cumulatively assumes a debt<sup>210</sup>. It is worth considering whether the

<sup>206</sup> M. Tomaszewski [in:] A. Szumański (ed.), *Arbitraż...*, op. cit., p. 373; R. Kulski: *Umowy procesowe...*, op. cit., p. 256.

<sup>207</sup> J. Górecki: *Komentarz do art. 876 k.c. [Commentary on Article 876 PCC]* [in:] K. Osajda (ed.), *Kodeks...*, op. cit., Legalis; A. Szpunar: *O zasadzie akcesoryjności poręczenia [Principle of auxiliary nature of a surety]*, *Palestra* 1992, No. 11–12, pp. 23–24.

<sup>208</sup> A. Szpunar: *O zasadzie...*, op. cit., p. 24.

<sup>209</sup> J. Górecki: *Komentarz do art. 876 k.c.* [in:] K. Osajda (ed.), *Kodeks...*, op. cit., Legalis; A. Szpunar: *O zasadzie...*, op. cit., p. 26.

<sup>210</sup> Z. Radwański [in:] J. Panowicz-Lipska (ed.), *Prawo zobowiązań — część szczegółowa. System Prawa Prywatnego [Law of obligations — specific part. System of Private Law]*, Vol. 8, Warsaw 2011, pp. 547–548; E. Kosior: *Umowa o kumulatywne przystąpienie do długu a umowa poręczenia (uwagi w świetle pozycji prawnej*

surety could not raise all defences and objections towards the creditor, also those related to the existence of an arbitration agreement. Resultantly, in such an event, if the creditor sued the surety before a state court, the latter could demand a rejection of a lawsuit invoking the existence of the arbitration agreement. Nonetheless, such interpretation has not been analysed deeply by commentators and courts in Poland, yet. It demands a further and careful analysis regarding the fact that an excessive and too liberal construction of the provisions cannot violate someone's right to court. We cannot lose sight of the fact that arbitration is consensual by nature. Also the surety's knowledge about the arbitration clause in the main contract plays a vital role in the whole concept and should be taken into account. Therefore, alternatively, it is worth considering to allow the surety to extend the arbitration clause against the creditor only on their demand, but not in the opposite way, as the surety did not take part in conclusion of the main contract. Nevertheless, such a concept requires a further in-depth analysis, which exceeds the scope of this publication. In addition, some academics point out that in the case of a partners' joint and several liability for debts in a general partnership, the arbitration agreement concluded by the general partnership should also bind partners, because the partners' obligation, in truth, mirrors the partnership's obligation, and thus it should also embrace the arbitration clause related to such an obligation<sup>211</sup>, contrary to the resolution of the Supreme Court<sup>212</sup>. Summing up, generally a surety, a guarantor, an investor in a construction project or a person jointly and severally liable, according to the majority of scholars, are not bound by an arbitration agreement included in a main contract between original parties, i.e. a debtor and a creditor<sup>213</sup>, because their liability is a distinct obligation that lies next to the obligations stemming from the main contract. Yet, the previous remarks cast doubts over the correctness of such interpretation.

### 3.4. CORPORATE DISPUTES

Academic scholarship in Poland regarding the problem of an arbitration clause contained in a partnership agreement or in the articles of association is rather impressive. Corporate disputes should be understood as those that may arise between a company and its shareholders or among shareholders themselves in relation to

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dłużnika) [Contract for cumulative debt assumption and surety contract — remarks on the debtor's legal position] [in:] T. Sokołowski (ed.), *Współczesne tendencje w dziedzinie zabezpieczenia wierzytelności* [Modern tendencies in securing debts], UAM conference papers, Poznań 2013, p. 100; A. Szpunar: *O zasadzie...*, *op. cit.*, p. 32.

<sup>211</sup> K. Malinowska-Woźniak: *Granice podmiotowe zapisu na sąd polubowny zawartego w umowie, której stroną jest osobowa spółka handlowa* [Ratione personae of an arbitration clause in a contract concluded by a commercial partnership], *Acta Iuris Stetinensis* 2016, No. 4, p. 49.

<sup>212</sup> Resolution of the Supreme Court of 13 July 2011, III CZP 36/11 (Poland).

<sup>213</sup> R. Kułski: *Umowy procesowe...*, *op. cit.*, p. 256; resolution of the Supreme Court of 13 July 2011, III CZP 36/11.

a company's business course. It shall not concern external relationships, i.e. those between a company and its creditors.

At first glance, that problem seems to be regulated by Article 1163 § 1 PCCP, under which an arbitration clause contained in an agreement or the articles of association of a partnership or a corporation concerning disputes arising out of such corporate relationship shall be binding on the partnership or corporation and its partners or shareholders (Article 1163 § 1 PCCP)<sup>214</sup>. For the purpose of this publication, the author shall use the notions: "company" or "corporation" interchangeably to describe companies in general. The abovementioned regulation encompasses partnerships and companies regulated by Polish Companies Act<sup>215</sup> (hereinafter referred to as PCA), i.e. either partnerships such as a general partnership, a limited partnership, a limited liability partnership, or companies: a limited liability company, a joint-stock company<sup>216</sup>. Scholars propose to extend the regulation accordingly over a civil law partnership and treat it in a similar manner, though it is just a type of contract among entrepreneurs for a joint cooperation to pursue common business goals<sup>217</sup>.

First, before starting an analysis regarding the scope of the arbitration clause, some overall remarks on corporate disputes must be made. The question is: what should be understood by corporate disputes? That matter has been deeply scrutinized by G. Suliński, who divided such disputes into three separate groups: (1) disputes regarding claims for consideration (i.e. payments), (2) disputes relating to an appeal against a resolution of the assembly of shareholders, (3) actions for formation of law<sup>218</sup>. The first category — disputes regarding claims for consideration — includes, e.g. claims for payment of dividends<sup>219</sup>, claims for remuneration to shareholders for performance of non-monetary obligations to the company<sup>220</sup> or the company's claims for paying up share capital to the company by shareholders<sup>221</sup>. The second category relates to an appeal against resolutions of the assembly of shareholders, which is

<sup>214</sup> M. Tomaszewski [in:] A. Szumański (ed.), *Arbitraż...*, op. cit., p. 372; T. Ereciński, K. Weitz: *Sąd...*, op. cit., p. 150.

<sup>215</sup> Act of 15 September 2000 — Code of Commercial Partnerships and Companies (Journal of Laws of 2000, No. 94, item 1037).

<sup>216</sup> A. Wiśniewski: *Międzynarodowy...*, op. cit., p. 489; T. Szczurowski: *Zakres podmiotowy zapisu na sąd polubowny sporu korporacyjnego* [Entities bound by an arbitration agreement referring to corporate disputes], *Monitor Prawa Handlowego* 2013, No. 6, p. 10; A. Jakubecki: *Komentarz do art. 1163 k.p.c.* [Commentary on Article 1163 PCCP] [in:] A. Jakubecki (ed.), *Komentarz aktualizowany do Kodeksu postępowania cywilnego* [Code of Civil Procedure. Updated commentary], Lex el. 2016.

<sup>217</sup> A. Zieliński [in:] A. Zieliński, K. Flaga-Gieruszyńska (eds.), *Kodeks...*, op. cit., p. 1799.

<sup>218</sup> G. Suliński: *Rozstrzyganie...*, op. cit., p. 115 et seq.

<sup>219</sup> *Ibidem*, p. 115.

<sup>220</sup> *Ibidem*, pp. 115–116.

<sup>221</sup> *Ibidem*, pp. 116–117; A. Szumański: *Zakres podmiotowy zapisu na sąd polubowny w sporze ze stosunku spółki kapitałowej ze szczególnym uwzględnieniem sporu powstałego na tle rozporządzenia prawami udziałowymi* [Ratione personae of an arbitration agreement in corporate disputes stemming from the disposal of rights attached to shares] [in:] P. Nowaczyk, S. Pieckowski, J. Poczubot, A. Szumański, A. Tynel (eds.), *Międzynarodowy i krajowy arbitraż handlowy u progu XXI wieku. Księga pamiątkowa dedykowana doktorowi habilitowanemu Tadeuszowi*



non-uniform category. Such disputes would include actions for repeal of a shareholders' resolution or action for a declaration of invalidity of a shareholders' resolution<sup>222</sup>. It is worth noting that the declaration of annulment has a declarative nature, which means that the invalidity itself occurs *ex tunc*<sup>223</sup>. As G. Suliński points out, if shareholders bring a case for invalidity of the resolution, the competence of an arbitration panel shall not be excluded in that matter and arbitrators will keep their power to handle the dispute<sup>224</sup>. The last, third category, refers to claims for formation of law, e.g. the exclusion of a shareholder or a dissolution (winding-up) of the company<sup>225</sup>.

Regardless of the aforementioned, there is still an unsettled problem of arbitrability of corporate disputes, mainly regarding actions for repeal of a shareholders' resolution or actions for declaration of invalidity of a shareholders' resolution. Article 1157 PCCP sets forth that arbitrability of the dispute depends on whether parties are entitled to conclude a settlement on the issue in dispute. Unfortunately, a shape of the provision casts doubts on whether it concerns all disputes (both involving economic and non-economic interests) or, alternatively, the requirement of ability of being settled through agreement only refers to non-economic interests, what would makes disputes involving economic interests always arbitrable<sup>226</sup>. Resultantly, in the first scenario each dispute must be scrutinized through a test of arbitrability (whether the dispute can be settled by the parties by agreement in dispute)<sup>227</sup> or, in the second scenario, all disputes involving economic interests should be *ipso iure* deemed arbitrable, while the test would just regard disputes involving non-economic interests. In the light of corporate disputes, such an issue is of great importance. On the one hand, the prevailing majority of scholars acknowledge that corporate disputes generally involve economic interests<sup>228</sup>. On the other hand, some universal categories, such as "invalidity", do not seem to be capable of being remedied through a settlement in dispute, bearing in mind that invalidity has an *ex tunc* effect and objective nature<sup>229</sup>. The problem of remedial actions of invalid acts falls outside the scope hereof. As a response to the aforesaid matter, some scholars propose to treat Article 1163 § 1 PCCP as a sole basis for arbitrability of corporate disputes (*lex specialis* to Article 1157 PCCP)<sup>230</sup>, so it could include all corporate disputes,

Szurkowski [International and domestic arbitration on the threshold of the 21<sup>st</sup> century. Liber Amicorum as a tribute to Professor Tadeusz Szurkowski], Warsaw 2008, p. 230.

<sup>222</sup> G. Suliński: *Rozstrzyganie...*, *op. cit.*, pp. 154–161.

<sup>223</sup> *Ibidem*, p. 162.

<sup>224</sup> *Ibidem*, p. 190.

<sup>225</sup> *Ibidem*, pp. 194–199.

<sup>226</sup> T. Ereciński, K. Weitz: *Sąd...*, *op. cit.*, p. 121.

<sup>227</sup> K. Weitz [in:] T. Ereciński (ed.), *Kodeks...*, *op. cit.*, p. 836.

<sup>228</sup> S. Sołtysiński [in:] S. Sołtysiński, A. Szajkowski, J. Szwaja, *Kodeks Spółek Handlowych. Komentarz [Commercial Companies Code. Commentary]*, Vol. 3, Warsaw 2008, pp. 244–245.

<sup>229</sup> K. Weitz [in:] T. Ereciński (ed.), *Kodeks...*, *op. cit.*, p. 837; T. Ereciński, K. Weitz: *Sąd...*, *op. cit.*, p. 122.

<sup>230</sup> A. Szumański: *Zakres podmiotowy...* [in:] P. Nowaczyk, S. Pieckowski, J. Poczubut, A. Szumański, A. Tynel (eds.), *Międzynarodowy i krajowy arbitraż...*, *op. cit.*, p. 231; G. Suliński, *Rozstrzyganie...*, *op. cit.*, p. 260.

e.g. those covering a problem of the invalidity. Nevertheless, the Polish Supreme Court in 2009 rejected such a possibility holding that Article 1157 PCCP refers to all disputes and their arbitrability, and Article 1163 § 1 PCCP specifies requirements as to the form and scope<sup>231</sup>. Nevertheless, some subsequent judgments of the Supreme Court suggested that the requirement of arbitrability of the disputes should be construed widely referring not to any particular dispute but rather to the rights being at parties' free disposal, thus such formula would contain also a problem of invalidity of legal acts<sup>232</sup>. The problem of arbitrability of corporate disputes falls outside the scope of this article, however, it would be impossible to move on with further analysis without any remarks on such an important matter.

Generally, disputes resulting from a corporate structure shape a wide range of various claims and actions. Part of the aforementioned disputes might refer to the shareholders and company. But some others can also have an impact on other persons' interests, e.g. the management board or some of its members or even employees. For example, a resolution of the assembly of shareholders might appoint new members of the management board and demote the old ones. Given that, it is necessary to analyse an issue of entities that potentially could invoke the arbitration clauses included in partnership agreements or articles of association in corporate disputes.

Previously cited Article 1163 § 1 PCCP indicates that an arbitration clause contained in an agreement or the articles of association of a partnership or corporation shall be binding on the partnership or corporation and its partners or shareholders. The provision does not mention any other persons, e.g. members of the management board. Both, judiciary and jurisprudence, treat the arbitration agreement described above as an arbitration agreement incorporated by reference<sup>233</sup>. The reason of such holding is that every time when a specific corporate dispute arises, e.g. as a result of a shareholders' resolution, the parties shall invoke an arbitration clause included in different documents — a partnership agreement or articles of association. However, the provision does not specify upon which particular shareholders or partners the arbitration clause should be binding. It does not say whether it concerns the shareholders or partners who originally concluded the partnership agreement or the articles of association, or only those who are parties to the arbitration agreement at the moment when the dispute arises. Scholars are rather unanimous that it can

<sup>231</sup> Resolution of the Supreme Court of 7 May 2009, III CZP 13/09 (Poland); T. Ereciński, K. Weitz: *Sąd...*, *op. cit.*, p. 122.

<sup>232</sup> K. Weitz [in:] T. Ereciński (ed.), *Kodeks...*, *op. cit.*, p. 835; A. Szumański: *Treść i forma zapisu na sąd polubowny w sporach korporacyjnych* [Content and form of an arbitration agreement in corporate disputes], *Monitor Prawa Handlowego* 2014, No. 2, p. 8; decision of the Supreme Court of 18 June 2010, V CSK 434/09; resolution of the Supreme Court of 23 September 2010, III CZP 57/10 (Poland); R. Kos: *Zdatność arbitrażowa sporów o ważność uchwał spółek kapitałowych* [Arbitrability of disputes regarding validity of corporate resolutions], *Przegląd Prawa Handlowego* 2014, No. 3, p. 36.

<sup>233</sup> Judgment of the Supreme Court of 12 October 2012, IV CSK 82/12 (Poland); A. Zieliński [in:] A. Zieliński, K. Flaga-Gieruszyńska, *Kodeks...*, *op. cit.*, p. 1800.

bind all partners and shareholders, either present or former<sup>234</sup>. It is compatible with global trends. In this case, the scope of arbitration should be shaped by an issue at stake and the nature of a dispute. However, no one can ignore PCA substantive law provisions regarding an action for repeal of a resolution of the general assembly. Under Article 250(1) PCA, also particular members of a management board are entitled to launch a claim within the aforementioned scope. Therefore, there is a contradiction between Article 1163 PCCP, which does not mention management board members as bound by an arbitration clause, and Article 250(1) PCA, which entitles also corporate bodies and management board members to file a lawsuit for repeal of a resolution. Furthermore, Article 254 § 1 PCA stipulates that a final judgment repealing the resolution has a binding effect in relations between the company and all partners and in relations between the company and members of the corporate bodies. There is a serious question of whether arbitral award could have a similar effect, even if not all of stakeholders took part in arbitration<sup>235</sup>.

According to the scholars' prevailing opinion, in the case of other persons that could have an interest in a dispute resolution but are not mentioned in Article 1163 § 1 PCCP, i.e. members of a management board, they are not parties to such an arbitration clause and are not entitled to take part in arbitration proceedings under current Polish statutory measures<sup>236</sup>. Nonetheless, there are some single critical standpoints about such strict interpretation of Article 1163 § 1 PCCP<sup>237</sup>. G. Suliński emphasizes that sticking to the letter of law might cause a risk that the same dispute would be tried partially by a state court and partially by an arbitration panel. For example, where a member of a management board and shareholder would bare a joint and several liability for undervaluation of a contribution in-kind<sup>238</sup>. Consequently, it might transpire that in the dispute regarding a consideration the arbitration panel

<sup>234</sup> A. Szumański: *Zakres podmiotowy...* [in:] P. Nowaczyk, S. Pieckowski, J. Poczobut, A. Szumański, A. Tynel (eds.), *Międzynarodowy i krajowy arbitraż...*, op. cit., p. 227; Ł. Błaszczak, M. Ludwik: *Sądownictwo...*, op. cit., p. 127; T. Ereciński, K. Weitz: *Sąd...*, op. cit., p. 147; M. Romanowski: *Utrata statusu wspólnika a związanie zapisem na sąd arbitrażowy [Losing the status of a shareholder in the light of the effectiveness of an arbitration clause]*, Przegląd Prawa Handlowego 2006, No. 6, p. 55; T. Szczurowski: *Zakres...*, op. cit., p. 11; decision of the Supreme Court of 1 March 2000, I CKN 845/99 (Poland); R. Morek: *Komentarz do art. 1163 k.p.c. [Commentary on Article 1163 PCCP]* [in:] E. Marszałkowska-Krześ, *Kodeks...*, op. cit., Legalis.

<sup>235</sup> A. Wiśniewski: *Rozstrzyganie sporów korporacyjnych przez sądy polubowne w świetle nowej regulacji zdatności arbitrażowej sporów [Adjudication of corporate disputes by arbitral panels in the light of the new regulations on arbitrability of disputes]* [in:] P. Nowaczyk, S. Pieckowski, J. Poczobut, A. Szumański, A. Tynel (eds.), *Międzynarodowy i krajowy arbitraż...*, op. cit., p. 298; R. Kos accepts that possibility (R. Kos: *Zdatność arbitrażowa...*, op. cit., p. 34).

<sup>236</sup> T. Ereciński, K. Weitz: *Sąd...*, op. cit., p. 147; R. Morek: *Arbitraż i mediacja. Komentarz [Arbitration and mediation. Commentary]*, Warsaw 2006, pp. 148–149; G. Suliński: *Rozstrzyganie...*, op. cit., p. 260; A. Budniak: *Forma zapisu na sąd polubowny w świetle polskiego i niemieckiego postępowania cywilnego — zagadnienia prawnoporównawcze [Form of arbitration agreement in the light of Polish and German civil proceedings — a comparative law analysis]*, ADR. Arbitraż i Mediacja 2009, No. 4, Legalis el.

<sup>237</sup> S. Sołtysiński: *Związanie...*, op. cit., p. 28.

<sup>238</sup> G. Suliński: *Związanie członka organu spółki zapisem na sąd arbitrażowy zawartym w umowie (statucie) spółki [Binding effect of an arbitration clause contained in a company's articles of association upon a member of the company's body]*, Przegląd Prawa Handlowego 2015, No. 6, p. 33.

would assess a shareholder's liability differently from a state court's assessment of the same legal situation, but in the case against a member of a management board. Such a dualism, according to some scholars, requires that a teleological interpretation be applied, looking at the purpose of the provision, and therefore the arbitration clause included in a partnership agreement or articles of association be extended to the company's bodies or members of the management board<sup>239</sup>. Such an interpretation would take into account the need for protection of a legal interest of persons who have such an interest in the dispute settled in arbitration proceedings<sup>240</sup>. Also the aforementioned dualism, which would allow the same legal issues to be assessed by two different bodies (institutions), has been criticized by the Polish Supreme Court expressing a view that such an outcome is highly undesirable<sup>241</sup>. B. Sołtys derives the possibility of extending an arbitration clause contained in a partnership agreement or articles of association to the company's bodies and members of the management board from a functional link between disputes: a dispute involving the company and members of the management board and a dispute over which competence of an arbitration panel is unquestionable<sup>242</sup>. Such a point of view can be justified by a functional interpretation of the provisions. Others propose to span the arbitration clause over members of the management board, but only in case if they have signed it<sup>243</sup>. Furthermore, some authors point out that there is no contradiction between Article 1163 § 1 PCCP and PCA provisions<sup>244</sup>. R. Kos explains that members of a management board, although they have capacity to launch claims under Article 250(1) PCA, they do not pursue their legal interest but rather interest of the company and its shareholders<sup>245</sup>. In addition, corporate bodies do not have a separate legal personality, therefore they cannot be a party to an arbitration agreement<sup>246</sup>. This is a main reason why Article 1163 PCCP does not list them. Consequently, both the company itself and their corporate bodies are covered by the arbitration clause, what results from the fact that the arbitration clause in articles of association partially

<sup>239</sup> *Ibidem*, p. 35; R. Uliasz: *Rozstrzyganie sporów korporacyjnych przez sąd polubowny — wybrane zagadnienia* [Settlement of corporate disputes through arbitration — selected issues], ADR. Arbitraż i Mediacja 2008, No. 3, Legalis.

<sup>240</sup> Similarly A. Surma: *Dopuszczalność poddania do rozpoznania sądowi polubownemu sporów dotyczących uchylecia lub stwierdzenia nieważności uchwał organów spółek kapitałowych* [Arbitrability of disputes related to a repeal or an annulment of resolutions taken by the company's bodies], *Studia Prawno-Ekonomiczne* 2014, Vol. 93, p. 91.

<sup>241</sup> Decision of the Supreme Court of 1 December 2017, I CSK 170/17.

<sup>242</sup> B. Sołtys: *Zapis na sąd polubowny w prawie spółek* [Arbitration agreement in corporate law] [in:] J. Frąckowiak (ed.), *Kodeks spółek handlowych po pięciu latach* [Polish Commercial Companies Code after five years], Wrocław 2006, p. 209.

<sup>243</sup> K. Falkiewicz, R.L. Kwaśnicki: *Arbitraż i mediacja w świetle najnowszej nowelizacji kodeksu postępowania cywilnego* [Arbitration and mediation in the light of the latest reform of the Polish Code of Civil Procedure], *Przegląd Prawa Handlowego* 2005, No. 11, p. 34.

<sup>244</sup> R. Kos: *Zdatność arbitrażowa...*, *op. cit.*, p. 35.

<sup>245</sup> *Ibidem*, p. 35.

<sup>246</sup> A. Szumański: *Treść...*, *op. cit.*, pp. 18–19; R. Kos: *Zdatność arbitrażowa...*, *op. cit.*, p. 35; opposite to that E. Marszałkowska-Krześ cited by G. Suliński: *Rozstrzyganie...*, *op. cit.*, p. 111.



shapes the internal corporate governance of the company that is also binding upon corporate bodies<sup>247</sup>. Nonetheless, such a standpoint still seems to be isolated.

Resultantly, the most certain standpoint concerning the presented problem seems to be that currently, under Polish law, an arbitration clause included in a partnership agreement or in articles of association binds only the company and its partners and shareholders, both present and former ones, regardless of whether they took part in drawing up of the arbitration clause<sup>248</sup>. It shall not concern the other entities, i.e. members of management boards, employees, officers, etc.<sup>249</sup> However, some other scholars point out that Article 1163 PCCP does not exclude such a possibility, or that it only sets up minimal standards as to the form which could be clarified by the parties in the agreement<sup>250</sup>. Comparing the aforesaid statutory measures with the previously presented German solutions, some parallels could be drawn between the current status of the Polish approach towards the problem and the German status before the *Arbitrability II* judgment. Recognizing the flaws of the system, in 2010 the Polish Codification Committee for Civil Law proposed some amendments to the current provisions. Firstly, it was proposed to extend the scope of the arbitration clause in articles of association to corporate bodies and their members (e.g. members of management boards) by new Article 1163 § 1 PCCP. Secondly, a requirement was introduced to new Article 1163 § 1 PCCP for mandatory communications (announcement to stakeholders) stipulated in the arbitration clause. Thus, the arbitration clause must provide a mandatory announcement about the commencement of arbitration in a manner generally required for official communications in the company<sup>251</sup>. Also other authors proposed to regulate such a matter, e.g. by adding a new set of provisions to PCCP regulating specifically the problem of corporate disputes in arbitration, i.e. the problem of arbitrability of corporate disputes or the right to a joinder<sup>252</sup>. A. Szumański notices that the aforesaid discrepancies create huge legal uncertainty<sup>253</sup>.

<sup>247</sup> R. Kos: *Zdatność arbitrażowa...*, *op. cit.*, p. 35.

<sup>248</sup> K. Weitz [in:] T. Ereciński (ed.), *Kodeks...*, *op. cit.*, p. 874; M. Tomaszewski [in:] A. Szumański (ed.), *Arbitraż...*, *op. cit.*, p. 372; T. Ereciński, K. Weitz: *Sąd...*, *op. cit.*, p. 147; G. Suliński: *Rozstrzygnięcie...*, *op. cit.*, pp. 257–258; T. Szczurowski: *Zakres...*, *op. cit.*, p. 12; A. Szumański: *Treść...*, *op. cit.*, p. 18.

<sup>249</sup> A. Szumański: *Zakres podmiotowy...* [in:] P. Nowaczyk, S. Pieckowski, J. Poczobut, A. Szumański, A. Tynel (eds.), *Międzynarodowy i krajowy arbitraż...*, *op. cit.*, p. 228; R. Morek: *Komentarz do art. 1163 k.p.c.* [in:] E. Marszałkowska-Krześ: *Kodeks...*, *op. cit.*, Legalis; M. Kłos: *Komentarz do art. 1163 k.p.c.* [Commentary on Article 1163 PCCP] [in:] A. Marciniak: *Kodeks postępowania cywilnego. Komentarz. Art. 1096–1217* [Code of Civil Procedure. Commentary. Articles 1096–1217], Vol. 4, Warsaw 2017, Legalis.

<sup>250</sup> A. Szumański: *Treść...*, *op. cit.*, pp. 18–19.

<sup>251</sup> A. Szumański: *Przeszkody prawne w przyjęciu kognicji sądów arbitrażowych w sporach o zaskarżenie uchwał zgromadzeń spółek kapitałowych (uwagi de lege lata oraz de lege ferenda)* [Legal obstacles regarding competence of arbitration tribunals in disputes relating to resolutions of general assemblies of shareholders (de lege lata and de lege ferenda remarks)] [in:] W. Jurcewicz, K. Pörnbacher, C. Wiśniewski (eds.), *Spory korporacyjne...*, *op. cit.*, p. 129.

<sup>252</sup> M. Tomaszewski: *O zaskarżaniu uchwał korporacyjnych do sądu polubownego — uwagi de lege ferenda* [On repealing corporate resolutions in arbitration — de lege ferenda remarks], *Przegląd Sądowy* 2012, No. 4, pp. 34–35.

<sup>253</sup> A. Szumański: *Przeszkody...*, *op. cit.*, p. 114.



### 3.5. IMPLIED AUTHORITY

Implied authority, as a basis for an extension of the arbitration agreement analysed by A. Wiśniewski<sup>254</sup>, is seemingly aimed at mirroring the common law institution of *agency*, namely *apparent authority*. The first question that must be put forward is whether under Polish law it is possible to apply a concept of implied authority to conclusion of an arbitration agreement. An agency relationship relies upon the assumption that an entity which concludes a main contract and an arbitration agreement is acting as an agent of another entity. The case facts should indicate that the agent has operated within the scope of their authorization and with intent of binding their principal with their action. Careful attention must be also drawn to the principal's behaviour that triggers a false impression to a third person that the agent has an authorization to represent the principal (apparent authority). Therefore, two fundamental issues must be discussed: first, whether it is possible to grant tacitly a power of attorney to enter into an arbitration agreement in Poland; second, whether it is possible that such an implied agent could also bind tacitly their principal with the arbitration agreement. These problems cannot be sorted out without a direct reference to the provisions on requirements of form for an arbitration agreement (Article 1162 PCCP)<sup>255</sup>. The consequences of not fulfilling the requirements of a written form of an arbitration agreement are crucial in this case. The assumption that the arbitration agreement should be concluded in writing otherwise it is null and void would jeopardize further debate over the possibility of concluding such an agreement tacitly.

In accordance with the Polish scholars' traditional standpoint which was shaped on the basis of previous legal provisions (Article 698 § 1 et seq. PCCP) before a huge reform of 2005<sup>256</sup>, the arbitration agreement had to be drafted in writing and signed by both parties, otherwise was null and void<sup>257</sup>. Such a standpoint did not stem expressly from the aforementioned provisions which wording used a conditional form "should" and did not provide as a consequence of lack of a written form the nullity of the arbitration agreement. In the course of time, such a strict point of view has changed, especially after reform of 2005, when to the traditional written form (however also without nullity as a consequence of non-fulfilment) also other more liberal forms were added. In the light of the new regulations, the requirement of the written form is also met when the arbitration agreement is contained in a document signed by the parties or in an exchange of letters or communications by means of telecommunication devices that provide a record of the agreement. Also, the refer-

<sup>254</sup> A. Wiśniewski: *Międzynarodowy...*, *op. cit.*, pp. 478–479.

<sup>255</sup> The requirements of form have been also mentioned by A. Wiśniewski [in:] A. Wiśniewski: *Międzynarodowy...*, *op. cit.*, p. 478.

<sup>256</sup> Act of 28 July 2005 — amendment to Code of Civil Procedure (Journal of Laws of 2005, No.178, item 1478).

<sup>257</sup> Ł. Błaszczak, M. Ludwik: *Sądownictwo...*, *op. cit.*, p. 117; T. Ereciński, K. Weitz: *Sąd...*, *op. cit.*, p. 136; S. Dalka: *Sądownictwo...*, *op. cit.*, pp. 75–76.

ence in a contract to a document containing an arbitration clause (*incorporation by reference*) constitutes an arbitration agreement (Article 1162 § 2 PCCP). But such a reference must point directly to the arbitration clause. There is no obstacle to conclude an arbitration agreement by e-mail or telefax<sup>258</sup>. A dispute has arisen among scholars regarding the consequences of not observing the form presented above. Some commentators claim that not meeting the requirement of form specified in Article 1162 PCCP, regardless of whether it is a written form or liberal ones, causes the nullity of the arbitration agreement or at least its ineffectiveness<sup>259</sup>. They emphasize that an arbitration agreement is a specific procedural agreement to which the PCC provisions on consequences of non-adherence to the requirement of the written form cannot be applied accordingly, if there are no consequences of such a flaw specified in PCCP<sup>260</sup>.

The opposite point of view highlights that the PCC provisions can be applied to the aforesaid situation if the form of an arbitration agreement is not observed<sup>261</sup>. Even if an arbitration agreement should be drawn up in writing, and such a form were not observed, where the provision itself did not provide for the nullity as a consequence, such agreement under PCC would be still valid. However, at a further stage some problems could arise concerning evidence and proof of the existence of such an arbitration agreement<sup>262</sup>. It could be impossible to prove its existence, e.g. by witnesses' testimonies. Nevertheless, such obstacles would not exist in the case of a dispute between entrepreneurs or where the certain legal act has been substantiated by means of a document (what can mean nowadays also an unsigned document or e-mail). They could pursue to prove that the arbitration agreement has been entered into by means of witnesses' testimonies or parties' interrogation what results directly from Article 74 § 4 PCC. Loosening of the requirement of form could open leeway to the possibility of concluding an arbitration agreement in any form, even tacitly<sup>263</sup>. The problem

<sup>258</sup> Ł. Błaszczak, M. Ludwik: *Sądownictwo...*, *op. cit.*, pp. 116–117.

<sup>259</sup> K. Weitz [in:] T. Ereciński (ed.), *Kodeks...*, *op. cit.*, p. 871; A. Wiśniewski: *Międzynarodowy...*, *op. cit.*, p. 479; T. Ereciński, K. Weitz: *Sąd...*, *op. cit.*, pp. 136–137; G. Suliński: *Rozstrzygnięcie...*, *op. cit.*, pp. 36–37; A. Szumański: *Konkludentne przystąpienie do zapisu na sąd polubowny* [Joining arbitration agreement by implied action], *Problemy Prawa Prywatnego Międzynarodowego* 2012, Vol. 11, p. 44; J. Jankowski: *Komentarz do art. 1162 k.p.c.* [Commentary on Article 1162 PCCP] [in:] J. Jankowski (ed.), *Kodeks postępowania cywilnego. Komentarz. Art. 730–1217* [Code of Civil Procedure. Commentary. Articles 730–1217], Vol. 2, Warsaw 2015, Legalis; judgment of the Appellate Court in Szczecin of 5 January 2016, I ACa 711/15 (Poland); A. Budniak: *Forma zapisu...*, *op. cit.*, Legalis el.

<sup>260</sup> T. Ereciński, K. Weitz: *Sąd...*, *op. cit.*, pp. 136–137.

<sup>261</sup> B. Gessel-Kalinowska vel Kalisz: *Zastrzeżenie formy pisemnej dla umowy o arbitraż jako zastrzeżenie formy pisemnej dla celów dowodowych* [Requirement of a written form for an arbitration agreement as the requirement of form for evidentiary purposes], *Państwo i Prawo* 2015, No. 12, p. 81.

<sup>262</sup> Ł. Błaszczak: *Skarga o uchylenie wyroku sądu polubownego* [Complaint to set aside an arbitral award], *Prawo Spółek* 2005, No. 2, p. 30; B. Kaczmarek-Templin: *Kilka uwag o elektronicznej postaci umowy o arbitraż w kontekście przepisów regulujących formę zapisu na sąd polubowny* [Several comments on the electronic form of arbitration agreement in relation to provisions which regulate the form of arbitration agreement], *ADR. Arbitraż i Mediacja* 2010, No. 3, Legalis.

<sup>263</sup> B. Gessel-Kalinowska vel Kalisz: *Zastrzeżenie...*, *op. cit.*, p. 80.

of form of an arbitration agreement and the consequences of non-adherence to such a form are not the subject matter of this publication, though it is an interesting topic worth a separate dissertation. The author just wants to emphasize that requirement as to the form as fundamental for the existence or validity of an arbitration agreement in the light of the aforesaid does not have to be observed so strictly, and scholars' opinions are disparate<sup>264</sup>. Additionally, A. Szumański proposes to distinguish between two situations. The first one is a conclusion of an arbitration agreement by implied action. The other one is where a third party joins tacitly an arbitration agreement, which has been already drawn up in writing<sup>265</sup>. That resembles a Swiss solution provided by the Swiss Federal Tribunal in 2003<sup>266</sup>.

Apart from the above deliberation, a special attention must be paid to Article 1167 PCCP which expressly stipulates that a power of attorney granted by an entrepreneur to perform a specific legal act (e.g. conclusion of a contract) encompasses also an authorization to enter into an arbitration agreement in relation to the legal act, unless otherwise set forth in the document of such a power of attorney. In this case, the agent by the fact of being authorized to conclude a main contract is also authorized to enter into the arbitration agreement. Thus, the provision establishes a legal presumption. Such a point of view, before Article 1167 PCCP was enacted, had been presented by M. Tomaszewski<sup>267</sup>. Therefore, in case of entrepreneurs, the power of attorney to conclude a commercial contract covers also the authorization to draft an arbitration agreement. Nevertheless, the existence of such an authorization does not simply mean that the agent would use it to enter into the arbitration agreement on the principal's behalf. However, it seems that such understanding of implied authority does not match the concept of agency worked out by the practice of international commercial arbitration. The agency concept assumes that conclusion of an arbitration agreement together with a main contract by one entity would in truth bind also other entities that are in some relationship with the signatory. Mostly, it has been invoked as an alternative way for veil piercing or the doctrine of a group of companies.

Regarding the previous remarks, theorists are rather sceptical about the application of the concept in the Polish legal system. A. Szumański claims that implied authority (actual authority), where members of a group of companies act on each other's behalf, cannot be applied because Polish law does not provide a group of companies with a legal personality (they are separate). Furthermore, legal persons (including companies) can be represented only by their bodies under Article 38 PCC<sup>268</sup>. A. Wiśniewski points out that a concept of entering into an arbitration agreement by implied authority cannot be accepted because of the requirement as to the

<sup>264</sup> Ł. Błaszczak, M. Ludwik: *Sądownictwo...*, *op. cit.*, p. 117; T. Ereciński, K. Weitz: *Sąd...*, *op. cit.*, p. 136.

<sup>265</sup> A. Szumański: *Konkludentne...*, *op. cit.*, p. 48.

<sup>266</sup> Judgment of 16 October 2003, DFT 129 III 727 (Swiss Federal Tribunal).

<sup>267</sup> M. Tomaszewski: *Umowa...*, *op. cit.*, p. 17.

<sup>268</sup> A. Szumański: *Wpływ uczestnictwa spółki kapitałowej w grupie spółek na związanie zapisem na sąd polubowny dokonany przez inną spółkę z grupy* [Consequences for a company of participation in a group of compa-

form which stays in relation to the PCC provisions regarding the power of attorney. Article 99 § 1 PCC provides that if the validity of a legal act requires a special form, the power of attorney authorizing to the performance of that act shall be granted in the same form<sup>269</sup>. Because the tacit conclusion of an arbitration agreement under Polish law is impossible, thus granting an implied authority to its conclusion would be impossible, too<sup>270</sup>. Therefore, even a false impression caused by the principal that the agent acts on their behalf is not sufficient to conclude such an agreement. On the other hand, accepting the fact that the arbitration agreement could be drawn up tacitly would open also a discussion over the implied authority in Polish law.

The Polish Supreme Court, having relied on the previous regulations (before the amendments of 2005), held that an arbitration agreement could not be concluded tacitly<sup>271</sup>. The requirement of a written form under a sanction of nullity was invoked, though it did not stem directly from the provision<sup>272</sup>. Also, the majority of scholars nowadays seem to accept that for the existence of an arbitration agreement, it is mandatory to observe one of the forms stipulated in Article 1162 § 1 PCCP. Nonetheless, there are also other standpoints emphasizing that non-adherence to that form does not have to necessarily cause its invalidity. Thus, it could be possible to enter into such an agreement tacitly. Such an interpretation would establish leeway for accepting that as well a power of attorney could be drawn up impliedly, according to the principle of freedom of a declaration of will (Article 60 PCC).

Summing up, without prejudice to any of the aforementioned theories, it must be said that an application of the concept of agency to Polish law could be extremely difficult nowadays. The institution, which is important, has been developed by the common law doctrine, thus its direct implementation to Polish law without any amendments seems impossible. Nevertheless, other solutions can be proposed. Under Article 1167 PCCP, a power of attorney granted by an entrepreneur to conclude a main contract also contains an authorization to enter into an arbitration agreement. This concerns only entrepreneurs and only the authorization to enter into a main contract and an arbitration agreement. However, this does not create on the agent's side an obligation to enter into the arbitration agreement or any legal presumption of conclusion of such an agreement. Regarding the concepts of implied authority or the possibility of entering into an arbitration agreement by implied action, the conclusion should be that currently it would be rather impossible to adopt them in Poland, merely because of the prevailing opinion among courts and scholars<sup>273</sup>. Nonetheless,

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nies in the light of effectiveness of an arbitration agreement drawn up by another company belonging to the group], *Przegląd Prawa Handlowego* 2008, No. 5, p. 51.

<sup>269</sup> A. Wiśniewski: *Międzynarodowy...*, *op. cit.*, pp. 478–479.

<sup>270</sup> S. Sołtysiński: *Związanie...*, *op. cit.*, p. 19; A. Wiśniewski: *Międzynarodowy...*, *op. cit.*, p. 479.

<sup>271</sup> Judgment of the Supreme Court of 27 June 1960, 4 Cr 874/59, OSN 1962, No. 3 item 85 (Poland).

<sup>272</sup> Judgment of the Supreme Court of 9 January 1969, I CZ 3/68, OSPiKA 1971, No. 7–8, item 139 (Poland).

<sup>273</sup> T. Ereciński, K. Weitz: *Sąd...*, *op. cit.*, pp. 136–137; R. Morek: *Arbitraż...*, *op. cit.*, pp. 144–145.

there is a noticeable paradigm shift regarding loosening the requirement of form of an arbitration agreement. It is not impossible that in the future, the strict interpretation of the provisions will change. Also, an idea of implied authority seems to be noticed by scholars and probably will be evolving.

### 3.6. ABUSE OF CORPORATE (LEGAL) PERSONALITY AND ABUSE OF SUBSTANTIVE RIGHTS VS VEIL PIERCING

The most widely commented grounds for the extension of an arbitration agreement to non-signatories seem to be an abuse of corporate personality and an abuse of substantive rights in Polish law<sup>274</sup>. The reason why the concepts are interesting is, first and foremost, the fact that they are in truth attempts of implementation to the Polish legal system institutions tantamount to *veil piercing* and the doctrine of a *group of companies* in a context of the extension of an arbitration agreement to non-signatories.

The whole argumentation should be started with a statement that, until now, the jurisprudence has not recognized under Polish law the doctrines of veil piercing or a group of companies as bases for extending a liability for a company's debts towards shareholders or companies operating in the same holding group. Relationships between companies inside the same group of companies or a majority ownership in a company could not justify liability of shareholders and parent companies for the company's or subsidiary's debts. The aforesaid rules have its roots in Article 151 § 4 of PCA<sup>275</sup>. According to this provision shareholders are not liable for a company's debts. Therefore, it would be even much harder to translate the concept to the problem of the scope of an arbitration agreement and its binding effect upon third parties. Apart from that, many provisions regulating a liability of officers (members of management boards) for a company's debts do exist in Polish law. For example, provisions of PCA (Article 299 § 1 PCA) that stipulate a liability of a member of the management board for a company's debts when enforcement proceedings against the company have become futile<sup>276</sup>. Furthermore, some administrative provisions can be invoked as example, i.e. Article 106a(1) of the Protection of Competition and Consumers Act<sup>277</sup> (hereinaf-

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<sup>274</sup> A. Wiśniewski: *Międzynarodowy...*, *op. cit.*, pp. 475–478; A. Szumański: *Wpływ uczestnictwa...*, p. 48 et seq.

<sup>275</sup> A. Szumański: *Wpływ uczestnictwa...*, *op. cit.*, p. 48; S. Kubsik: *Odpowiedzialność wspólników (akcjonariuszy) spółki kapitałowej za zobowiązania spółki w stosunku do jej wierzycieli na przykładzie grupy spółek* [*Shareholders' liability for a company's debts to its creditors on the example of a group of companies*], *Przegląd Prawa Handlowego* 2013, No. 8, p. 50.

<sup>276</sup> A. Kappes: *Odpowiedzialność członków zarządu za zobowiązania spółki z o.o.* [*Liability of members of management board for limited liability company's debts*], Warsaw 2009, p. 53.

<sup>277</sup> Act of 16 February 2007 — Protection of Competition and Consumers Law (*Journal of Laws* of 2007, No. 50, item 331).



ter referred to as PCCA) that provides for monetary penalties in an amount of up to PLN 2,000,000 imposed on a managing person, if that person deliberately led an entrepreneur (company) into taking part in forbidden agreements which aim was to restrict the competition on the market<sup>278</sup>.

However, a view that a traditional veil piercing as a common law doctrine could not be introduced to Polish legal system has evolved significantly. Currently, scholars accept it that some contract or tort law institutions can be basis for shareholder's liability<sup>279</sup>. First, Article 415 PCC referring simply to a tort liability must be cited<sup>280</sup>. Under Article 415 PCC whoever in his fault caused damage to another person shall be obliged to redress it. Translating that regulation into the realm of holding structures, it must be said that there is a possibility of extending the scope of a liability for a company's debts to its shareholders. However, as in any other tort case, some specific factors must occur. These are: (1) damage related to a company's course of business, (2) a shareholders' activity including control over a company's matters, (3) a direct causal relationship between factors (1) and (2)<sup>281</sup>. Both the jurisprudence and the judiciary emphasize that damage must be proven directly in order to extend the liability to shareholders<sup>282</sup>.

Such a long introduction is intended in order to put forward a thesis that the problem of veil piercing in Poland is always a matter of someone's damage. It is a fundamental obstacle to apply Article 415 PCC and tort liability to the problem of extension of an arbitration agreement to non-signatories. The fact that a dispute is not tried by an arbitration panel could not be deemed to be damage under Polish law<sup>283</sup>. Similarly, the same problem appears when analysing the issue of officers' liability for a company's debts under Article 299 PCA. In that case, liability relies upon debt and the creditor's damage. Therefore, present solutions for veil piercing developed in Poland cannot be the grounds for extending the arbitration agreement to non-signatories because of the lack of damage. It is also highly questionable whether an arbitration agreement as a contractual construct could be extended under tort law provisions, regarding its contractual nature<sup>284</sup>. However, although the word-

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<sup>278</sup> M. Rządowski: *Piercing the Corporate Veil in Poland? A Comparative Perspective*, Comparative Law Review 2015, No. 20, p. 75.

<sup>279</sup> R. Szczepaniak: *Glosa do wyroku SN z dnia 17 marca 2015 r., I PK 179/14 [Gloss on the judgment of the Supreme Court of 17 March 2015, I PK 179/14]*, Orzecznictwo Sądów Polskich 2016, No. 7–8, LEX el.

<sup>280</sup> T. Targosz: *Odpowiedzialność wspólnika wobec wierzycieli spółki [Shareholders' liability towards company's creditors]*, Przegląd Prawa Handlowego 2013, No. 4 p. 27; P. Czarnecki: *Odpowiedzialność pracodawcy a rozwój struktur holdingowych [Employer's liability and development of holding structure]*, Warsaw 2014, pp. 118–119.

<sup>281</sup> Z. Radwański, A. Olejniczak: *Zobowiązania — część ogólna [Obligations — general part]*, Warsaw 2008, pp. 215–219.

<sup>282</sup> M. Rządowski: *Piercing...*, *op. cit.*, p. 77; judgment of the Supreme Court of 24 November 2009, V CSK 169/09 (Poland).

<sup>283</sup> A. Wiśniewski: *Międzynarodowy...*, *op. cit.*, p. 475; A. Szumański: *Wpływ uczestnictwa...*, *op. cit.*, p. 53.

<sup>284</sup> M. Zachariasiewicz, J. Zralek: *Czy umowa arbitrażowa rozciąga się na podmioty powiązane ze spółką będącą stroną tej umowy? [Can an arbitration agreement be extended to entities related to a company that is a party to such agreement?]*, ADR. Arbitraż i Mediacja 2009, No. 2, p. 175.

ing of the New York Convention, particularly of its Article 2(1), provides that an arbitration agreement may concern “defined legal relationship, whether contractual or not”, what could possibly suggest that there is room for tort claims related to the container contract in arbitration, it would still depend on the scope and wording of the arbitration agreement itself. Therefore, such claims can arise in arbitration proceedings only if a broad and general wording of the arbitration agreement allows so<sup>285</sup>. They are rooted in parties’ consent, thus, regardless of their tortious nature, they cannot appear in arbitration without the contractual basis. Nonetheless, commentators have worked out some other solutions that could be the basis for such an extension: abuse of legal personality and abuse of substantive rights. However, they are not undisputable and are a matter of a wide discussion.

### 3.7. ABUSE OF CORPORATE (LEGAL) PERSONALITY, ABUSE OF SUBSTANTIVE RIGHTS VS A GROUP OF COMPANIES DOCTRINE

Article 5 PCC stipulates a general rule concerning the abuse of substantive rights. One cannot exercise their right in a manner which would contradict its social and economic purpose or the principles of social coexistence. Such an act or omission on the part of the person entitled shall not be considered the exercise of that right and shall not be protected<sup>286</sup>. However, that provision cannot be a sole basis for a claim. It can be just used for a defensive purpose<sup>287</sup>. Thus, if a claimant brings to court a claim which a defendant considers to be violating the principles of social coexistence, the defendant can raise such an objection. Nevertheless, the claimant cannot rely their claim on a statement that it stems from the principles of social coexistence. This is because the principles of social coexistence should be deemed to be rules of people’s behaviour, which do not have a strictly legal dimension and rely mainly on a moral evaluation, and are deeply rooted in a society’s mainstay<sup>288</sup>. Mostly, they are associated with ethics. In professional bargaining among entrepreneurs, loyalty, commercial integrity or good commercial practice have often been

<sup>285</sup> M. Moses: *The Principles...*, *op. cit.*, pp. 31–32.

<sup>286</sup> P. Machnikowski: *Komentarz do art. 5 k.c. [Commentary on Article 5 PCC]* [in:] E. Gniewek, P. Machnikowski (eds.), *Kodeks...*, *op. cit.*, Legalis 2016; M. Gutowski: *Komentarz do art. 5 k.c. [Commentary on Article 5 PCC]* [in:] M. Gutowski (ed.), *Kodeks cywilny. Komentarz. Art. 1–449<sup>1</sup>* [Civil Code. Commentary. Articles 1–449<sup>1</sup>], Vol. 1, Warsaw 2016, Legalis.

<sup>287</sup> A. Szumański: *Wpływ uczestnictwa...*, *op. cit.*, p. 57; A. Wiśniewski questions a strictly defensive nature of that provision because of its importance for the whole system of private law (A. Wiśniewski: *Nadużycie...*, *op. cit.*, p. 14); E. Wętrys: *Skuteczność zapisu na sąd polubowny spółki zależnej wobec spółki dominującej [Binding effect of arbitration agreement concluded by a subsidiary of a parent company]*, ADR. Arbitraż i Mediacja 2010, No. 3, pp. 188–189.

<sup>288</sup> P. Machnikowski: *Komentarz do art. 5 k.c.* [in:] E. Gniewek, P. Machnikowski (eds.), *Kodeks...*, *op. cit.*, Legalis 2016.

given as examples of such principles. On the other hand, the clause of the social and economic purpose concerns the purpose and use of the right. It resorts to a functional aspect of the substantive rights, where the rights are devoted to some specific use and mission to perform<sup>289</sup>. In the light of the extension of an arbitration agreement A. Wiśniewski identifies such problems in the following manner. For example, an entity that should be bound by an arbitration agreement because of their active role in negotiating and concluding a main contract which finally has been concluded by its subsidiary avoids a binding effect of the arbitration agreement plainly by misusing the subsidiary<sup>290</sup>. An obstacle to adoption of such an idea is a defensive role of Article 5 PCC<sup>291</sup>. Resultantly, it cannot be a sole justification for the competence of an arbitral panel for dispute resolution. Commentators are rather sceptical about that concept<sup>292</sup>. Moreover, requirements of the form for the arbitration agreement could be also a potential obstacle. However, a pending discussion over that matter, globalisation process and attempts to break the rule of a defensive nature of Article 5 PCC, can indicate that the problem of the abuse of substantive rights as the basis for extension of the scope of an arbitration agreement will evolve. Consequently, such a paradigm shift may, in the near future, cause that not only formal parties but also “less obvious” ones will be bound by an arbitration agreement. Nevertheless, the problem still seems to be unexplored and requires further in-depth analysis in Poland<sup>293</sup>.

The abuse of corporate (legal) personality is often treated as a subcategory of the abuse of substantive rights. It is nothing else than a reflection of veil piercing and attempt at applying the doctrine to Polish law<sup>294</sup>. As scholars notice, the abuse of corporate personality means that a subsidiary is misused by real decision makers. Also there must be some element of unfairness or injustice<sup>295</sup>. Nevertheless, until now Polish legislature has not created legal aids that could extend the arbitration agreement to non-signatories under that legal institution. *Prima facie*, it also seems to have a lot in common with the problem of a group of companies and, although it has never been accepted in Poland, lawyers notice its existence and need for regulation of that concept<sup>296</sup>. It is natural that the purpose of a group of companies is to spread and divide a business risk among affiliates operating inside one holding group.

<sup>289</sup> *Ibidem*.

<sup>290</sup> A. Wiśniewski: *Międzynarodowy...*, *op. cit.*, p. 477.

<sup>291</sup> A. Szumański: *Wpływ uczestnictwa...*, *op. cit.*, p. 57.

<sup>292</sup> M. Tomaszewski [in:] A. Szumański (ed.), *Arbitraż...*, *op. cit.*, p. 374; A. Szumański: *Wpływ uczestnictwa...*, *op. cit.*, p. 57.

<sup>293</sup> M. Tomaszewski [in:] A. Szumański (ed.), *Arbitraż...*, *op. cit.*, p. 374.

<sup>294</sup> *Ibidem*; A. Zbiegień-Turzańska: *Komentarz do art. 5 k.c. [Commentary on Article 5 PCC]* [in:] K. Osajda (ed.), *Kodeks...*, *op. cit.*, Legalis.

<sup>295</sup> A. Wiśniewski: *Międzynarodowy...*, *op. cit.*, p. 478; A. Szumański: *Wpływ uczestnictwa...*, *op. cit.*, p. 57.

<sup>296</sup> A. Szumański: *Spór wokół roli interesu grupy spółek i jego relacji w szczególności do interesu własnego spółki uczestniczącej w grupie [Dispute over the role of a group interest and its relation to the sole interest of a company belonging to the group]*, *Przegląd Prawa Handlowego* 2010, No. 5, pp. 9–17.

Commentators put forward that the existence of a group of companies requires: (1) two or more companies; (2) relationship of domination and subsidiarity among them; (3) a common interest of a group as a whole<sup>297</sup>. Some courts in Poland have started recognizing the group interest as a factor justifying business decisions made by decision makers, even if it violates a single interest of a subsidiary to some extent<sup>298</sup>. In terms of the extension of an arbitration agreement, the concept still seems to be new. According to some scholars, a binding effect of the arbitration agreement to non-signatories under the doctrine of a group of companies would not necessarily require the negative consequences (mostly some damage) or an element of unfairness, but rather strong relations among companies, e.g. proven by the performance of a main contract<sup>299</sup>. Regardless of the aforesaid comments, under present statutory measures in Poland it is impossible to extend the scope of an arbitration agreement to other affiliates belonging to the holding group that are non-signatories to the arbitration agreement<sup>300</sup>. The tenet is, however, open and demands more detailed deliberation.

#### 4. POTENTIAL THREATS AND OBSTACLES TO EXTENSION OF AN ARBITRATION AGREEMENT TO NON-SIGNATORIES UNDER POLISH LAW

The author hereof would like to draw attention to various obstacles that could jeopardize the application of the concept of the extension of an arbitration agreement to non-signatories under Polish law. First, it must be taken into consideration whether such an extension would not violate a third person's constitutional right to court<sup>301</sup>. Second, it must be considered whether the extension of an arbitration agreement to a third party does not breach requirements of the form of the arbitration agreement. Furthermore, it should be taken into account, whether binding non-signatories with an arbitration agreement and their participation in arbitration proceedings do not cause a voidability of an arbitral award. In some situations, an uncontrolled extension of an arbitration agreement can effect that the arbitral award issued during arbitration commenced on the basis of such an agreement could be set aside or not recognized in some jurisdictions.

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<sup>297</sup> A. Szumański: *Grupy spółek [Groups of companies]* [in:] S. Sołtysiński (ed.), *System Prawa Prywatnego [System of Private Law]*, Vol. 17a, Warsaw 2011, p. 677; S. Sołtysiński: *Związanie...*, *op. cit.*, p. 15.

<sup>298</sup> Judgment of the Appellate Court in Katowice of 3 December 2012, V ACa 702/12 (Poland); Judgment of the Appellate Court in Szczecin of 6 May 2009, II Aka 142/08 (Poland).

<sup>299</sup> A. Wiśniewski: *Międzynarodowy...*, *op. cit.*, p. 488.

<sup>300</sup> M. Pacocha: *Przebicie zasłony korporacyjnej a związanie zapisem na sąd polubowny [Veil piercing and binding effect of arbitration agreement]*, *Przegląd Prawa Handlowego* 2017, No. 6, p. 58.

<sup>301</sup> S. Sołtysiński: *Związanie...*, *op. cit.*, p. 21.

At the beginning, the issue that should be analysed is whether arbitration as one of methods of dispute resolution pursues a constitutional right to court. According to Article 45(1) of the Polish Constitution, everyone shall have the right to a fair and public hearing of their case, without undue delay, before a competent, impartial and independent court. In addition, this provision stays in close relationship with another one of Article 175(1) of the Polish Constitution which sets forth that the administration of justice in the Republic of Poland shall be provided by the Supreme Court, common courts, administrative courts and military courts. Resultantly, the constitutional provisions do not mention anything about voluntarily established private institutions (private courts) and arbitration panels. In Poland, the right to court has been understood as everyone's right to defend their substantive rights in court proceedings that provide some procedural guarantees. Scholars list four elements of the right to court: (1) access to a court; (2) the features of bodies which handle disputes are the same as in the case of state courts; (3) observance of proper procedure; (4) effectiveness and enforceability of court decisions<sup>302</sup>. It is clear that arbitration does not have all of the aforesaid features<sup>303</sup>. For example, it is hard to acknowledge that an arbitration panel would meet all requirements as set up for state courts regarding judges' experience and competence<sup>304</sup>. Furthermore, regulations concerning the procedure before an arbitration panel/arbitrator depend on parties' consent. They are not generally applicable legal provisions. On the other hand, the grounds for sorting out the dispute by means of arbitration is a procedural agreement — an arbitration agreement which by definition should be voluntary and which envisages parties' consent. Some commentators claim that up to some extent parties to an arbitration agreement can waive their rights stemming from Article 45 of the Polish Constitution in the aforesaid scope<sup>305</sup>.

Theorists (e.g. B. Banaszak) do not see a conflict between state courts and other bodies, regardless of whether public or private, whose purpose is to resolve disputes. Their existence does not exclude the right to court<sup>306</sup>. The idea of arbitration, as well as other ADRs, relies upon parties' consent. There is a unanimous

<sup>302</sup> J. Tarno [in:] R. Hauser, Z. Niewiadomski, A. Wróbel (eds.), *Sądowa kontrola administracji publicznej. System Prawa Administracyjnego [Judicial supervision over the public administration. Administrative Law System]*, Vol. 10, Warsaw 2016, p. 217; M. Wyrzykowski, M. Ziółkowski [in:] R. Hauser, Z. Niewiadomski, A. Wróbel (eds.), *Konstytucyjne zasady prawa i ich znaczenie dla interpretacji zasad ogólnych prawa i postępowania administracyjnego. System Prawa Administracyjnego [Constitutional principles of law and their impact on the interpretation of general principles of administrative law and administrative procedure. Administrative Law System]*, Vol. 2, Warsaw 2012, pp. 25–26.

<sup>303</sup> T. Ereciński, K. Weitz: *Sąd...*, *op. cit.*, pp. 16–17.

<sup>304</sup> Ł. Błaszczak, M. Ludwik: *Sądownictwo...*, *op. cit.*, pp. 54–55; P. Lalive: *Transnational...*, *op. cit.*, pp. 269–271.

<sup>305</sup> T. Grzegorzczak, K. Weitz: *Komentarz do art. 45 Konstytucji RP [Commentary on Article 45 of the Polish Constitution]* [in:] M. Safjan, L. Bosek (eds.), *Konstytucja RP. Komentarz do art. 1–86 [Polish Constitution. Commentary on Articles 1–86]*, Vol. 1, Warsaw 2016, Legalis.

<sup>306</sup> B. Banaszak: *Komentarz do art. 45 Konstytucji RP [Commentary on Article 45 of the Polish Constitution]* [in:] B. Banaszak (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz [Constitution of the Republic of Poland. Commentary]*, Warsaw 2012, Legalis.



standpoint that arbitration itself does not collide with the constitutional right to court. Nevertheless, the justifications for such a statement are various. Some argue that arbitration does not undermine the right to court because parties voluntarily waive that right through an agreement or because arbitral awards are scrutinized by a state court at the stage of recognition or enforcement and the regulations do not exclude supervision over the arbitration by state courts (A. Deryng)<sup>307</sup>. Also R. Morek emphasizes that the arbitration does not violate the right to court, which does not have to be pursued exclusively by state courts, but could be also before an alternative forum<sup>308</sup>. A. Wiśniewski emphasizes that the right to court can be limited under Article 31(3) of the Polish Constitution which stipulates that any limitation on the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons<sup>309</sup>. Therefore, protection of individuals' freedoms is supposed to be a justifying factor. It is worth noting at this point that there is a clash of some interests here: on the one hand, there is constitutional freedom that enables persons to waive some of their certain rights through an arbitration agreement, and on the other hand, a universal right to court. A. Wiśniewski holds that an opportunity of referring the disputes between parties to arbitration on a contractual basis is justified by a necessary limitation on their right to court<sup>310</sup>. The freedom of the individual as another constitutional value (Article 5 of the Polish Constitution) should be the prevailing one. Some other theorists point out that the freedom of individuals is confined to the arbitration agreement and ends at the stage when arbitration proceedings have started to be pending, because arbitral award cannot be treated as a part of the arbitration agreement<sup>311</sup>. Yet, a purpose hereof is not to decide which of the aforementioned concepts relating to the arbitration and the constitutional right to court should prevail. Thus, the author shall be content with a thesis, which is actually undisputable, that arbitration does not collide with values resulting from the Polish Constitution and that stem partially from a voluntary decision made by the parties to the arbitration agreement and through it. Moreover, regarding a judgment rendered by the European Court of Human Rights (ECtHR) in *Pechstein* case of 2018<sup>312</sup>, however specifically referring to sports arbitration and CAS (Court of Arbitration for Sport), some remarks can be made on the relation between the arbitration and Article 6(1) of the European Convention on Human Rights (ECHR). In

<sup>307</sup> A. Deryng: *Sąd polubowny a realizacja konstytucyjnej zasady prawa do sądu [Arbitration and constitutional right to court]*, ADR. Arbitraż i Mediacja 2009, No. 1, p. 53.

<sup>308</sup> R. Morek: *ADR — Alternatywne metody rozwiązywania sporów w sprawach gospodarczych [ADR — Alternative dispute resolution methods in commercial disputes]*, Warsaw 2004, pp. 49–53.

<sup>309</sup> A. Wiśniewski: *Międzynarodowy...*, *op. cit.*, p. 69.

<sup>310</sup> *Ibidem*, pp. 69–71.

<sup>311</sup> Ł. Błaszczak: *Wyrok...*, *op. cit.*, p. 79.

<sup>312</sup> *Mutu and Pechstein v. Switzerland*, judgment of 2 October 2018, ECHR 324 (2018).

this case ECtHR held that if arbitration is not entirely consensual (the Court determined that the claimant's consent had not been freely given), then it must meet the standards set forth in Article 6(1) ECHR providing a right to a fair trial, *inter alia*, the right to a public hearing if a party demands so. Therefore, the consensual nature of arbitration is crucial, and if it is limited, then a higher standard of proceedings must be met — tantamount to those provided for in Article 6(1) ECHR.

In the context of this article, one should consider whether the adoption in Polish law of the idea of extending an arbitration agreement to persons that have not signed such an agreement and have not covered it by their will does not interfere with these persons' constitutional right to court. Regarding the aforementioned grounds for the extension of the scope of an arbitration agreement under Polish law, the following should be analysed: a universal and a singular legal succession, an agreement for a performance to a third person, an abuse of substantive rights or an abuse of corporate personality. It seems that under legal succession, both singular and universal, such collision between them and the constitutional right to court would not occur. It would be the same in the case of a general transfer of contractual rights and obligations. First of all, one cannot lose sight of the fact that grounds of such as an assignment or an assumption of debt are consensual by nature, mostly incorporated in some contract. Their purpose is to grant a successor with the legal status of the predecessor with all consequences which follow. An arbitration agreement itself does not deprive an individual of a right to court entirely but always in relation to some particular contractual relationship<sup>313</sup>. In a situation where a successor voluntarily replaces a party to a contract, such a succession cannot be selective. It would be undesirable if a legal successor gained benefits from the succession of the contract without burdens resulting therefrom. Under these circumstances an arbitration agreement is, regardless of its autonomy, an element functionally related to the main contract. Such deliberation were also analysed by the Polish Supreme Court. In its resolution, the Supreme Court held that an uncontrolled spillover of the scope of an arbitration agreement to third party can violate their right to court. The Supreme Court emphasized that depending on whether the third party is replacing a signatory or acting independently (i.e. as a jointly and severally liable party), will or will not be a party to the arbitration agreement. Thus, the arbitration agreement is binding upon legal successors and does not encompass a jointly and severally liable person<sup>314</sup>. However, the issue seems to be more complex in the case of a third party for whose benefit contract should be performed.

As it has been presented above, in the contract for a performance to a third party such a third party can demand the direct performance of the contract from

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<sup>313</sup> T. Ereciński, K. Weitz: *Sąd...*, *op. cit.*, pp. 21–22.

<sup>314</sup> Resolution of the Supreme Court of 13 July 2011, III CZP 36/11 (Poland).

a debtor. The consideration (performance) goes in one direction. As it has already been explained, if a third party launched a claim before a state court, a debtor could invoke an arbitration agreement. At this point, there is a question of whether the third party for whose benefit the contract should be performed is not deprived of a right to court. Answering this question, firstly a source of the third party's claim should be analysed. Such a claim results from the main contract between the debtor and the creditor. If both parties to the main contract decided to resolve all disputes related to the main contract by arbitration, the third party who did not participate in the conclusion of the contract, when referring dispute to a state court, would take a step for which the parties did not agree. The fact that the third party gains benefits from the contract does not entitle them to change its content. In this case, the arbitration agreement is related to the main contract — it is one of its features. Only parties to that contract can change its content (until the third party notifies one of the parties of the intent of accepting performance). Mostly, if the contract is performed for the benefit of the third party, such a stipulation has its origins in another contractual relationship, between the creditor and the third party. They can both decide in a separate agreement that they want to sort out their disputes through arbitration or litigation. However, such an agreement must not worsen a position of the debtor. Scholars unanimously acknowledge that the third party is bound by an arbitration agreement.

The whole issue gets complicated in the case of an extension of an arbitration agreement under the doctrines of an abuse of substantive rights or an abuse of corporate personality. As stated beforehand, uncontrolled extension of the arbitration agreement to non-signatories could violate their right to court. In this case, the real intent of signatories and non-signatories must always be carefully determined to not make the participation in arbitration coercive. Irrespective of whether it is international or domestic arbitration, consent to arbitrate is crucial. In the light of the concepts presented herein, it would be impossible under Polish law to bind non-signatories with an arbitration agreement under the theories of the abuse of substantive rights or the abuse of corporate personality. Therefore, the discussion over the potential breach of the constitutional right to court based on such concepts is merely hypothetical.

When discussing the problem of the extension of an arbitration agreement theorists rarely pay attention to the form of the arbitration agreement, especially when it is mandatory in some jurisdictions to draw up the arbitration agreement in writing. Article 1162 § 1 PCCP requires one to conclude an arbitration agreement in writing, regardless of whether it is a separate agreement or an arbitration clause. The requirement has been relaxed by Article 1162 § 2 PCCP which provides that the form is observed also when it is contained in documents exchanged by parties or in statements sent by means of telecommunication which provide a record of the agreement. There is a prevailing opinion among scholars that the provision concerns

a written form or forms, tantamount e.g. to electronic form. Hence, it is not a traditional written form. Such an interpretation can be supported by, *inter alia*, international regulations, especially by the New York Convention<sup>315</sup> regarding the form of an arbitration agreement. According to Article 2(2) New York Convention, “agreement in writing” means an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams. Also, the provisions of the European Convention<sup>316</sup> seem to be less strict. Article 1(2)(a) provides that an arbitration agreement shall mean either an arbitral clause in a contract or an arbitration agreement being signed by the parties, or contained in an exchange of letters, telegrams, or in a communication by teleprinter and, in relations between states whose laws do not require that an arbitration agreement be made in writing, any arbitration agreement concluded in the form authorised by these laws. The PCCP provisions regulating that construct should be construed, on one hand as a mandatory form, and on the other hand as a less stricter than typical written form to be understood as signed by the parties.

In Poland, both the judiciary and jurisprudence take a position that an arbitration agreement cannot be concluded tacitly without clear manifestation of the parties’ intent expressed in the form provided for in Article 1162 PCCP<sup>317</sup>. There is also a prevailing opinion that the arbitration agreement is null and void in the case of lack of such a form. Additionally, the existence of an arbitration agreement cannot be proved, e.g. by means of witnesses’ statements. It is rather important, because when dealing with the extension of an arbitration agreement to non-signatories, a problem of form seems to be passed over. The fact that currently an arbitration agreement cannot be concluded by implied action, i.e. by performance of the main contract, actually settles that in Poland there is also no room for implied authority or implied consent as it is in the domain of international *lex mercatoria*. Such a problem would not exist in the case of a legal succession or a contract for performance to a third party. In the event of a legal succession, the transfer of rights stemming from the contract often takes place by means of a document. For example, in the case of the assumption of debt, the written form is mandatory otherwise acquisition is null and void (Article 522 PCC). Furthermore, in a contract for performance to a third party, the content incorporated in the main contract (including an arbitration clause) determines the parties to the contract and a person who is the beneficiary. Nonetheless, the grounds such as an abuse of substantive rights or an abuse of corporate legal personality may result in the personal scope of an arbitration clause being extended beyond the written framework of the contract. Therefore, extending an arbitration agreement to non-signatories without the strictly specified contrac-

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<sup>315</sup> United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (New York Convention).

<sup>316</sup> European (Geneva) Convention on International Commercial Arbitration of 21 April 1961.

<sup>317</sup> A. Budniak: *Forma zapisu...*, *op. cit.*, Legalis el.

tual basis can contravene provisions on requirements as to the form. On the other hand, it is worth considering whether the fact that the main contract with an arbitration agreement has been concluded in writing and after conclusion other entities join the contract, e.g. impliedly, does not meet the requirements as to the form. In such a situation an arbitration agreement exists in the written form. Only after its conclusion, does a question arise about the personal scope of the agreement and the parties to the agreement, not formal but also real ones (that resembles the aforesaid Swiss approach to that matter)<sup>318</sup>. Yet, such deliberation falls outside the scope hereof. The author just wants to put forward the issue roughly to emphasize that the implementation of the concept could be highly uncertain due to the requirements of form of an arbitration agreement.

Ł. Błaszczak and M. Ludwik highlight that consequences of the extension of an arbitration agreement to non-signatories under Polish present statutory measures triggers a risk that a person who has participated in arbitration proceedings against their will could file a complaint and demand to set aside the arbitral award claiming that there has been no arbitration agreement that covered their dispute (Article 1206 § 1 paras. 1 and 2 PCCP)<sup>319</sup>. The importance of consent to arbitration, not only of actual parties but also real, less-obvious, ones has been emphasized once more. Under the presented theories, the legal effectiveness and scope of arbitral award after the extension of an arbitration agreement also seem to be problematic<sup>320</sup>. The situation could get even more complicated in the case of enforcement of such an award, if a Polish court determined that the award was rendered on the basis of an arbitration agreement that had been involuntarily extended to third parties (e.g. a group member). Under Article V(2)(b) New York Convention, the court might resort to the violation of public policy understood as a universally recognized right to a court and a fair trial when refusing the enforcement of an award. Nevertheless, the problem requires a deeper analysis.

## 5. CONCLUSION

The practice of international commercial arbitration has worked out the concept of extension of an arbitration agreement to entities who have not originally signed such an agreement. The scope of the arbitration agreement would encompass entities that are to some extent related to the main contract or one of the

<sup>318</sup> Judgment of 16 October 2003, DFT 129 III 727 (Swiss Federal Tribunal); J.F. Poudret, S. Besson: *Comparative...*, p. 221 with some critical remarks on that solution.

<sup>319</sup> A. Szumański: *Zakres podmiotowy...* [in:] P. Nowaczyk, S. Pieckowski, J. Poczubut, A. Szumański, A. Tynel (eds.), *Międzynarodowy i krajowy arbitraż...*, *op. cit.*, p. 234; Ł. Błaszczak, M. Ludwik: *Sądownictwo...*, *op. cit.*, p. 278; K. Potrzebowski, W. Żywicki: *Sądownictwo polubowne. Komentarz dla potrzeb praktyki [Arbitration. Commentary for legal practitioners]*, Warsaw 1961, p. 98.

<sup>320</sup> Ł. Błaszczak: *Wyrok...*, *op. cit.*, pp. 425–426.



parties. The grounds for such an extension have been invoked as follows: an agency, an implied consent, a third party beneficiary, an equitable estoppel, a veil piercing or a group of companies. Scholars cite also other grounds, e.g. a legal succession, an assignment or an acquisition of debt. The agency, implied consent or third party beneficiary are contractual constructs, and they are deeply rooted in common law systems. Throughout different jurisdictions, courts are keener on extending arbitration agreements when a third party demands so. In the opposite way, where an actual party to the contract (a signatory) requires such an extension to a non-signatory, the chances are smaller. In this case, the court would likely check whether the third party has gained direct benefits from the contract. The veil piercing doctrine is associated with widely understood business organizations or corporate law. Practitioners point out that in the case of veil piercing, it is necessary to determine that major shareholders performed absolute control over a company when it entered into or was performing the contract and that the fraud or any other injustice or unfairness were involved. The equitable estoppel and the veil piercing doctrine are more focused on equity and fairness than parties' consent to arbitration. The doctrine of a group of companies, deeply analysed in case of *Dow Chemical*, enables one to span the scope of an arbitration agreement and, consequently, to introduce non-signatories to arbitration proceedings. The reason for the extension was the fact that companies belonging to the same group of companies were interrelated and took part in the contract's performance. Furthermore, in the *Dow Chemical* case the non-signatories were those who demanded participation in arbitration proceedings. Nevertheless, the group of companies doctrine has been deemed as consent-based theory with the main goal of determining the parties' intent through their conduct. Courts would likely extend an arbitration agreement to a non-signatory who demands so. Signatories should foresee that they would be a party to some arbitration proceedings, what is not so obvious in the case of non-signatories. Arbitration must still rely upon consent and forcing an outsider to participate in the arbitration without their will would miss the point. Contrarily, there is a discussion pending on the role of consent in international commercial arbitration. Some authors would like to minimize its role, some think that there is a need for a modern approach to consent in international arbitration, more focused on commercial reality.

In Poland, the tenet of the extension of an arbitration agreement to non-signatories still seems to be unexplored. Scholars and the judiciary agree that such an extension takes place in the case of a legal succession, both universal (transformation of a company or a succession by inheritance) and singular (e.g. an assignment, an acquisition of debt) or subrogation. Additionally, there is no doubt that a third person for whose benefit a contract is performed is bound by the arbitration clause included in that contract. Moreover, by the prevailing opinion of commentators and courts, the arbitration agreement does not bind sureties, guarantors and persons

jointly and severally liable, what can raise some questions as to correctness of that solution, posed by the author in this article. In corporate disputes, an arbitration clause in a partnership agreement or articles of association concerning disputes arising out of the corporate relationship is binding upon the partnership or corporation and its partners or shareholders. It refers to all partners and shareholders, former and present ones. However, it does not concern corporate bodies and members of the management board, what has been repeatedly criticized. Also, implied authority as a reflection of common law agency, would not be grounds for extending the arbitration agreement to non-signatories in Poland. Furthermore, Polish law requires for arbitration agreement to be compiled in a written form, though with a possibility of replacing it by, e.g. statements given by means of electronic communication. The extension of the arbitration agreement to a non-signatory raises a question of whether it does not violate requirements as to the form of the arbitration agreement, and consequently cause its invalidity.

Moreover, the extension of the arbitration agreement would not be possible under provisions on tort liability (Article 415 PCC) to real decision-makers or shareholders because of the lack of traditionally understood damage. Non-submission of a case to arbitration cannot be deemed to be damage in Polish law. Furthermore, the contractual nature of the arbitration agreement could potentially prevent its extension based on provisions referring to tort liability, however, it would depend on the wording of an arbitration clause. Instead of veil piercing or the group of companies doctrine, some practitioners propose to resort to the abuse of substantive rights (Article 5 PCC) or the abuse of corporate legal personality. Such theories should be analysed carefully. Although they have been supported by some theorists, they still cannot be treated as the grounds for the extension of an arbitration agreement to third persons in Poland. Nevertheless, the current status of the study on that topic is unsatisfactory. In addition, the author's standpoint is that the application of the concepts worked out by international practice to Polish legal system might be highly disputable for the following reasons. First, in the case of extending of an arbitration clause to non-signatories, there is a serious question of compliance of such a solution with the constitutional right to court. Especially, when a third person has no interest in participating in arbitration proceedings. Eventually, a too liberal attitude towards that matter could challenge the validity of an arbitral award or, as a public policy in Poland, would lead to the refusal of enforcement of a foreign arbitral award rendered on a basis of the extended arbitration agreement. Thus, it is worth considering whether such an extension should not occur on a third party's demand in the first place, to analyse their real intent, and then on demand of actual parties to the arbitration agreement. Nonetheless, such *de lege ferenda* proposal needs further in-depth analysis. And second, such an extension could violate requirements as to the form of the arbitration agreement which, as many commentators believe, are mandatory.

## LIST OF REFERENCES

- Andrews N.: *Strangers to Justice no Longer: The Reversal of the Privity Rule under the Contracts (Rights of Third Parties) Act 1999*, Cambridge Law Journal 2001, Vol. 60, No. 2.
- Badia A.: *Piercing the Veil of State Enterprises in International Arbitration*, Kluwer Law International 2014.
- Banaszak B. (ed.): *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warsaw 2012.
- Barceló III J.J.: *Who Decides the Arbitrators' Jurisdiction? Separability and Competence-Competence in Transnational Perspective*, Vanderbilt Journal of Transnational Law 2003, Vol. 36, No. 4.
- Blackaby N., Hunter J.M., Partasides C., Redfern A.: *Redfern and Hunter on International Commercial Arbitration*, Oxford University Press 2015.
- Blumberg P.L.: *The Law of Corporate Groups: Procedural Problems in the Law of Parent and Subsidiary Corporations*, Boston–Toronto 1983.
- Błaszczak Ł.: *Skarga o uchylenie wyroku sądu polubownego*, Prawo Spółek 2005, No. 2.
- Błaszczak Ł., Ludwik M.: *Sądownictwo polubowne (arbitraż)*, Warsaw 2007.
- Błaszczak Ł.: *Wyrok sądu polubownego w postępowaniu cywilnym*, Warsaw 2010.
- Born G.B.: *International Commercial Arbitration*, Vol. 1, 2<sup>nd</sup> ed., Kluwer Law International 2014.
- Brekoulakis S.: *Third Parties in International Commercial Arbitration*, New York 2010.
- Brekoulakis S.: *Rethinking Consent in International Commercial Arbitration: A General Theory for Non-Signatories*, Journal of International Dispute Settlement 2017, No. 8.
- Brunet E., Speidel R.E., Sternlight J., Ware, S.J. (eds.): *Arbitration Law in America, A Critical Assessment*, New York 2006.
- Budniak A.: *Forma zapisu na sąd polubowny w świetle polskiego i niemieckiego postępowania cywilnego — zagadnienia prawnoporównawcze*, ADR. Arbitraż i Mediacja 2009, No. 4.
- Budniak-Rogala A.: *Charakter prawny zapisu na sąd polubowny w postępowaniu cywilnym*, Wrocław 2015.
- Carter J., Fellas J. (eds.): *International Commercial Arbitration in New York*, New York 2010.
- Cohen D.: *Arbitrage et groupes de contrats*, Rev. arb. 1997, No. 2.
- Czarnecki P.: *Odpowiedzialność pracodawcy a rozwój struktur holdingowych*, Warsaw 2014.
- Dalka S.: *Sądownictwo polubowne w PRL*, Warsaw 1987.
- Daujotas R.: *Non-Signatories and Abuse of Corporate Structure in International Commercial Arbitration*, International Economic Law eJournal 2012, Vol. 7, No. 78.

- Deryng A.: *Sąd polubowny a realizacja konstytucyjnej zasady prawa do sądu*, ADR. Arbitraż i Mediacja, 2009, No. 1.
- Easterbrook F.H.: *Limited Liability and the Corporation*, The University of Chicago Law Review, 1985 No. 52.
- Ereciński T., Weitz K.: *Sąd arbitrażowy*, Warsaw 2008.
- Ereciński T. (ed.): *Kodeks postępowania cywilnego. Komentarz. Międzynarodowe postępowanie cywilne. Sąd polubowny*, Vol. 6, Warsaw 2017.
- Falkiewicz K., Kwaśnicki R.L.: *Arbitraż i mediacja w świetle najnowszej nowelizacji kodeksu postępowania cywilnego*, Przegląd Prawa Handlowego 2005, No. 11.
- Fenichel Z.: *Czy prawa i obowiązki natury procesowej przechodzą na prawnonabywców?*, Przegląd Sądowy 1930, No. 3.
- Fouchard P., Gaillard E., Goldman B.: *Fouchard, Gaillard, Goldman on International Commercial Arbitration*, Kluwer Law International 1999.
- Fuller L.L.: *Collective Bargaining and the Arbitrator* [in:] M.L. Kahn (ed.), *Collective Bargaining and the Arbitrator's Role*, Proceedings of the 15<sup>th</sup> Annual Meeting, National Academy of Arbitrators, Washington D.C. 1962.
- Gaillard E., Bermann G.A.: *The UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards New York 1958*, Brill Nijhoff 2017.
- Gapska E.: *Skuteczność zapisu na sąd polubowny zawartego w umowie podwykonawczej wobec inwestora ponoszącego odpowiedzialność solidarną na podstawie art. 647<sup>1</sup> § 5 k.c.*, Przegląd Prawa Handlowego 2017, No. 1.
- Gessel-Kalinowska vel Kalisz B. (ed.): *Diagnoza arbitrażu. Funkcjonowanie prawa o arbitrażu i kierunki postulowanych zmian*, Wrocław 2014.
- Gessel-Kalinowska vel Kalisz B.: *Zastrzeżenie formy pisemnej dla umowy o arbitraż jako zastrzeżenie formy pisemnej dla celów dowodowych*, Państwo i Prawo 2015, No. 12.
- Gniewek E. (ed.): *Kodeks cywilny. Komentarz*, Warsaw 2008.
- Gniewek E., Machnikowski P. (eds.): *Kodeks cywilny. Komentarz*, Warsaw 2016, Legalis.
- Goette W.: *Zdatność arbitrażowa sporów o zaskarżanie uchwał w spółkach kapitałowych — rozwój orzecznictwa sądu Najwyższego w Niemczech* [in:] W. Jurczewicz, K. Pörnbacher, C. Wiśniewski (eds.), *Spory korporacyjne w praktyce arbitrażowej — perspektywa polska i niemiecka*, Warsaw 2017.
- Goulding S.: *Principles of Company Law*, London 1996.
- Graves J., Davydan Y.: *Competence-Competence and Separability — American Style* [in:] S. Kröll, L.A. Mistelis, P. Perales Viscasillas, V. Rogers (eds.), *International Arbitration and International Commercial Law. Synergy, Convergence and Evolution*, Kluwer Law International 2011.
- Grier N.: *UK Company Law*, Chichester–New York 1998.



- Gutowski M. (ed.): *Kodeks cywilny. Komentarz. Art. 1–449<sup>11</sup>*, Vol. 1, Warsaw 2016, Legalis.
- Hałgas M.: *Charakter prawny zapisu na sąd polubowny*, Przegląd Ustawodawstwa Gospodarczego 2007, No. 7.
- Hamilton R.W., Macey J.R., Moll D.K.: *Cases and Materials on Corporations Including Partnerships and Limited Liability Companies*, 11<sup>th</sup> ed., West 2010.
- Hanotiau B.: *Complex Arbitrations: Multiparty, Multicontract, Multi-issue and Class Actions*, Kluwer Law International 2006.
- Hanotiau B.: *Consent to Arbitration: Do we Share a Common Vision?*, Arbitration International 2011, No. 4.
- Hauser R., Niewiadomski Z., Wróbel A. (eds.): *Konstytucyjne zasady prawa i ich znaczenie dla interpretacji zasad ogólnych prawa i postępowania administracyjnego. System Prawa Administracyjnego*, Vol. 2, Warsaw 2012.
- Hauser R., Niewiadomski Z., Wróbel A. (eds.): *Sądowa kontrola administracji publicznej. System Prawa Administracyjnego*, Vol. 10, Warsaw 2016.
- Holtzman H., Neuhaus J.: *A Guide to the UNCITRAL Model Law on International Commercial Arbitration*, Kluwer 1994.
- Hosking J.M.: *Non-Signatories and International Arbitration in the United States: the Quest for Consent*, Arbitration International 2004, Vol. 20, No. 3.
- Jakubecki A. (ed.): *Komentarz aktualizowany do Kodeksu postępowania cywilnego*, LEX el. 2016.
- Jankowski J. (ed.): *Kodeks postępowania cywilnego. Komentarz. Art. 730–1217*, Vol. 2, Warsaw 2015, Legalis.
- Kaczmarek-Templin B.: *Kilka uwag o elektronicznej postaci umowy o arbitraż w kontekście przepisów regulujących formę zapisu na sąd polubowny*, ADR. Arbitraż i Mediacja 2010, No. 3, Legalis.
- Kappes A.: *Odpowiedzialność członków zarządu za zobowiązania spółki z o.o.*, Warsaw 2009.
- Kos R.: *Zdatność arbitrażowa sporów o ważność uchwał spółek kapitałowych*, Przegląd Prawa Handlowego 2014, No. 3.
- Kosior E.: *Umowa o kumulatorywne przystąpienie do długu a umowa poręczenia (uwagi w świetle pozycji prawnej dłużnika)* [in:] T. Sokołowski (ed.), *Współczesne tendencje w dziedzinie zabezpieczenia wierzytelności*, UAM conference papers, Poznań 2013.
- Kryvoi Y.: *Piercing the Corporate Veil in International Arbitration*, Global Business Law Review 2011, Vol. 169, No. 1.
- Kubśik S.: *Odpowiedzialność wspólników (akcjonariuszy) spółki kapitałowej za zobowiązania spółki w stosunku do jej wierzycieli na przykładzie grupy spółek*, Przegląd Prawa Handlowego 2013, No. 8.
- Kulski R.: *Umowy procesowe w postępowaniu cywilnym*, Zakamycze 2006.
- Kuratowski R.: *Sądownictwo polubowne*, Warsaw 1932.



- Lalive P.: *Transnational (or Truly International) Public Policy and International Arbitration* [in:] P. Sanders (ed.), *Comparative Arbitration Practice and Public Policy in Arbitration*, ICCA Congress Series, Vol. 3, Kluwer Law International 1987.
- Leadley J., Williams L.: *Peterson Farms: There is no Group of Companies Doctrine in English Law*, *International Arbitration Law Review* 2004.
- Malinowska-Woźniak K.: *Granice podmiotowe zapisu na sąd polubowny zawarte w umowie, której stroną jest osobowa spółka handlowa*, *Acta Iuris Stetinensis* 2016, No. 4.
- Marciniak A.: *Kodeks postępowania cywilnego. Komentarz. Art. 1096–1217*, Vol. 4, Warsaw 2017, Legalis.
- Marszałkowska-Krześ E. (ed.): *Kodeks postępowania cywilnego. Komentarz*, Warsaw 2017, Legalis.
- Martinez-Fraga P.J.: *The Dilemma of Extending International Commercial Arbitration Clauses to Third Parties: Is Protecting Federal Policy While Accommodating Economic Globalization a Bridge to Nowhere?*, *Cornell International Law Journal* 2013, No. 46.
- Mazur M.: *Moc wiążąca umów procesowych na przykładzie zapisu na sąd polubowny*, *ADR. Arbitraż i Mediacja* 2011, No. 1.
- Morek R.: *ADR — Alternatywne metody rozwiązywania sporów w sprawach gospodarczych*, Warsaw 2004.
- Morek R.: *Arbitraż i mediacja. Komentarz*, Warsaw 2006.
- Moses M.L.: *The Principles and Practice of International Commercial Arbitration*, Cambridge University Press 2012.
- Okoli Ch.S.A.: *English Courts Address the Potential Convergence between Doctrines of the Corporate Veil, Party Autonomy in Jurisdiction Agreements and Privivity of Contract*, *Journal of Business Law* 2014.
- Osajda K. (ed.): *Kodeks cywilny. Komentarz*, Warsaw 2017, Legalis.
- Pacocha M.: *Przebicie zasłony korporacyjnej a związanie zapisem na sąd polubowny*, *Przegląd Prawa Handlowego* 2017, No. 6.
- Panowicz-Lipska J. (ed.): *Prawo zobowiązań — część szczegółowa. System Prawa Prywatnego*, Vol. 8, Warsaw 2011.
- Park W.W.: *Arbitration of International Business Disputes. Studies in Law and Practice*, 2<sup>nd</sup> ed., Oxford 2012.
- Pazdan M.: *Prawo właściwe dla oceny zapisu na sąd polubowny*, *Rejent* 2003, No. 10.
- Pobożniak G., Ściborowski K.: *Zmiany podmiotowe umowy prawa materialnego a zakres związania klauzulą arbitrażową*, *e-Przegląd Arbitrażowy* 2017, No. 1–2.
- Potrzebowski K., Żywicki W.: *Sądownictwo polubowne. Komentarz dla potrzeb praktyki*, Warsaw 1961.

- Pörnbacher K., Dolgorukow A.: *Zdatność arbitrażowa sporów korporacyjnych (o zaskarżanie uchwał) — perspektywa niemiecka* [in:] W. Jurcewicz, K. Pörnbacher, C. Wiśniewski (eds.), *Spory korporacyjne w praktyce arbitrażowej — perspektywa polska i niemiecka*, Warsaw 2017.
- Poudret J.F., Besson S.: *Comparative Law of International Arbitration*, London 2007.
- Radwański Z., Olejniczak A.: *Zobowiązania — część ogólna*, Warsaw 2008.
- Romanowski M.: *Utrata statusu wspólnika a związanie zapisem na sąd arbitrażowy*, Przegląd Prawa Handlowego 2006, No. 6.
- Rowley J.W. (ed.): *Arbitration World*, 2<sup>nd</sup> ed., London 2006.
- Ruggie J.: *Protect, Respect and Remedy: A Framework for Business and Human Rights*, Innovations, Spring 2008.
- Rządowski M.: *Piercing the Corporate Veil in Poland? A Comparative Perspective*, Comparative Law Review 2015, No. 20.
- Safjan M., Bosek L. (eds.): *Konstytucja RP. Komentarz do art. 1–86*, Vol. 1, Warsaw 2016, Legalis.
- Sandrock O.: *Arbitration Agreements and Groups of Companies*, The International Lawyer 1993, Vol. 27, No. 4.
- Siedlecki W.: *Postępowanie cywilne. Zarys wykładu*, Warsaw 1987.
- Siedlik K.: *Charakter prawny umowy arbitrażowej w prawie niemieckim i polskim*, Przegląd Ustawodawstwa Gospodarczego 2000, No. 2.
- Skąpski J.: *W kwestii mocy obowiązującej zapisu na sąd polubowny dla cesjonariusza stron*, Polski Proces Cywilny 1934, No. 16–17.
- Sołtys B.: *Zapis na sąd polubowny w prawie spółek* [in:] J. Frąckowiak (ed.), *Kodeks spółek handlowych po pięciu latach*, Wrocław 2006.
- Sołtysiński S. (ed.): *System Prawa Prywatnego*, Vol. 17a, Warsaw 2011.
- Sołtysiński S.: *Związanie zapisem na sąd polubowny i orzeczeniem arbitrażowym członków zgrupowania spółek, ich wspólników i interesariuszy*, Problemy Prawa Prywatnego Międzynarodowego 2012, No. 11.
- Steingruber A.M.: *Consent in International Arbitration*, Oxford 2012.
- Suliński G.: *Rozstrzyganie sporów ze stosunku spółki kapitałowej przez sąd polubowny*, Warsaw 2008.
- Suliński G.: *Związanie członka organu spółki zapisem na sąd arbitrażowy zawartym w umowie (statucie) spółki*, Przegląd Prawa Handlowego 2015, No. 6.
- Surma A.: *Dopuszczalność poddania do rozpoznania sądowi polubownemu sporów dotyczących uchylenia lub stwierdzenia nieważności uchwał organów spółek kapitałowych*, Studia Prawno-Ekonomiczne 2014, Vol. 93.
- Szczepaniak R.: *Glosa do wyroku SN z dnia 17 marca 2015 r., I PK 179/14*, Orzecznictwo Sądów Polskich 2016, No. 7–8, LEX el.
- Szczurowski T.: *Zakres podmiotowy zapisu na sąd polubowny sporu korporacyjnego*, Monitor Prawa Handlowego 2013, No. 6.

- Szpunar A.: *O zasadzie akcesoryjności poręczenia*, Palestra 1992, No. 11–12.
- Szumański A.: *Wpływ uczestnictwa spółki kapitałowej w grupie spółek na związanie zapisem na sąd polubowny dokonany przez inną spółkę z grupy*, Przegląd Prawa Handlowego 2008, No. 5.
- Szumański A.: *Zakres podmiotowy zapisu na sąd polubowny w sporze ze stosunku spółki kapitałowej ze szczególnym uwzględnieniem sporu powstałego na tle rozporządzenia prawami udziałowym* [in:] P. Nowaczyk, S. Pieckowski, J. Poczobut, A. Szumański, A. Tynel (eds.), *Międzynarodowy i krajowy arbitraż handlowy u progu XXI wieku. Księga pamiątkowa dedykowana doktorowi habilitowanemu Tadeuszowi Szurskiemu*, Warsaw 2008.
- Szumański A.: *Spór wokół roli interesu grupy spółek i jego relacji w szczególności do interesu własnego spółki uczestniczącej w grupie*, Przegląd Prawa Handlowego 2010, No. 5.
- Szumański A.: *Konkludentne przystąpienie do zapisu na sąd polubowny*, Problemy Prawa Prywatnego Międzynarodowego 2012, No. 11.
- Szumański A.: *Treść i forma zapisu na sąd polubowny w sporach korporacyjnych*, Monitor Prawa Handlowego 2014, No. 2.
- Szumański A. (ed.): *Arbitraż handlowy, System Prawa Handlowego*, Vol. 18, Warsaw 2015.
- Szumański A.: *Przeszkody prawne w przyjęciu kognicji sądów arbitrażowych w sporach o zaskarżenie uchwał zgromadzeń spółek kapitałowych (uwagi de lege lata oraz de lege ferenda)* [in:] W. Jurcewicz, K. Pörnbacher, C. Wiśniewski: *Spory korporacyjne w praktyce arbitrażowej — perspektywa polska i niemiecka*, Warsaw 2017.
- Targosz T.: *Odpowiedzialność wspólnika wobec wierzycieli spółki*, Przegląd Prawa Handlowego 2013, No. 4.
- Tomaszewski M.: *Umowa o arbitraż. Podstawowe problemy prawne*, Przegląd Ustawodawstwa Gospodarczego 1994, No. 1.
- Tomaszewski M.: *O zaskarżaniu uchwał korporacyjnych do sądu polubownego — uwagi de lege ferenda*, Przegląd Sądowy 2012, No. 4.
- Tweeddale A.: *Arbitration under the Contracts (Right of Third Parties) Act 1999 and Enforcement of an Award*, Arbitration International 2011, Vol. 27, No. 4.
- Uliasz R.: *Rozstrzyganie sporów korporacyjnych przez sąd polubowny — wybrane zagadnienia*, ADR. Arbitraż i Mediacja 2008, No. 3, Legalis.
- Várady T., Barceló III J.J., von Mehren A.T.: *International Commercial Arbitration. A Transnational Perspective*, 5<sup>th</sup> ed., West 2012.
- Voser N.: *Multi-party Disputes and Joinder of Third Parties* [in:] A.J. van den Berg (ed.), *50 Years of the New York Convention: ICCA Congress Series*, Vol. 14, The Hague 2009.
- Wachter V. von: *The Corporate Veil*, New Law Journal 2007, No. 157.

- Weitz K.: *Następstwo prawne a związanie zapisem na sąd polubowny*, ADR. Arbitraż i Mediacja 2011, No. 4.
- Weitz K.: *Następstwo prawne w zakresie przedmiotu sporu w toku postępowania przed sądem polubownym*, Problemy Prawa Prywatnego Międzynarodowego 2012, No. 11.
- Wętrys E.: *Skuteczność zapisu na sąd polubowny spółki zależnej wobec spółki dominującej*, ADR. Arbitraż i Mediacja 2010, No. 3.
- Wiśniewski A.: *Rozstrzyganie sporów korporacyjnych przez sądy polubowne w świetle nowej regulacji zdolności arbitrażowej sporów* [in:] P. Nowaczyk, S. Pieckowski, J. Poczobut, A. Szumański, A. Tynel (eds.), *Międzynarodowy i krajowy arbitraż handlowy u progu XXI wieku. Księga pamiątkowa dedykowana doktorowi habilitowanemu Tadeuszowi Szurskiemu*, Warsaw 2008.
- Wiśniewski A.: *Międzynarodowy arbitraż handlowy w Polsce*, Warsaw 2011.
- Wiśniewski A.: *Nadużycie prawa podmiotowego jako podstawa rozciągnięcia zapisu na sąd polubowny na podmioty powiązane kapitałowo*, Problemy Prawa Prywatnego Międzynarodowego 2013, No. 13.
- Wormser M.: *Piercing the Veil of Corporate Entity*, Col.L.Rev. 1912, No. 12.
- Wrześniewski P.: *Charakter prawny zapisu na sąd polubowny*, Oficyna Wydawnicza 2011.
- Zachariasiewicz M.: *Właściwość sądów wspólnotowych w sprawach umów Wspólnoty Europejskiej z podmiotami prywatnymi*, Europejski Przegląd Sądowy 2006, No. 9.
- Zachariasiewicz M., Zralek J.: *Czy umowa arbitrażowa rozciąga się na podmioty powiązane ze spółką będącą stroną tej umowy?*, ADR. Arbitraż i Mediacja, 2009, No. 2.
- Zieliński A., Flaga-Gieruszyńska K. (eds.): *Kodeks postępowania cywilnego. Komentarz*, Warsaw 2016.
- Zralek J., Kurowski W.: *Wpływ przelewu wierzytelności na klauzulę arbitrażową*, ADR. Arbitraż i Mediacja 2008, No. 3.

**Słowa kluczowe:** ADR (alternatywne metody rozwiązywania sporów), umowa o arbitraż, strony niebędące sygnatariuszami

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ARBITRATION AGREEMENT AND NON-SIGNATORIES.  
A COMPARATIVE PERSPECTIVE AND POLISH SOLUTIONS

S u m m a r y

The article touches on the problem of an extension of an arbitration agreement towards non-signatories. Firstly, the author describes and categorizes grounds for such extension in the comparative perspective taking into account opinions formulated by international practitioners, court decisions and arbitral awards. Secondly, the author evaluates them through a perspective of a possibility of their application to the Polish legal system. The author conducts an analysis of the grounds for the extension of arbitration agreement towards non-signatories under the current Polish statutory measures and tries to compare them to those existing in international context. Moreover, the article concerns potential obstacles and threats related to an adoption of these grounds in Polish law.

**Keywords:** ADR, arbitration agreement, non-signatories